No. 3624.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,
Appellants,
vs.
J. H. Merriam et al.,
Appellees.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

This is the second appeal in this action. Upon the first appeal a decree of dismissal, entered upon a motion of the defendants to dismiss, was reversed.

Pickens v. Merriam, 242 Fed. 363.

[Petition for rehearing of Appellee Merriam denied.]

Upon reversal the appellees here answered and the cause was tried, resulting in a decree of dismissal [Tr. pp. 194-200], from which this appeal is taken.

Charles F. Fensky was by order of the court allowed to become intervenor and filed his complaint in intervention seeking similar relief to that of the complainants. [Tr. pp. 186-191.]

STATEMENT OF THE CASE.

This is an action brought by the appellants to compel an accounting, on the part of the defendants, for certain property belonging to the estate of Ferdinand Fensky, deceased, and to the estate of Jeanette Fensky, deceased; to have certain releases and quitclaims executed by the complainants and the father of the intervenor adjudged to be void by reason of the fact that they were obtained through misrepresentation and fraud; to require the appellee, Merriam, administrator of the estate of Jeanette Fensky, to account to the appellants for their respective distributive shares of the said estate; to have certain deeds signed by the said Jeanette Fensky in her lifetime, purporting to convey certain real property to certain of the defendants, declared to be void; to have the defendants declared to hold the said property as trustees for the appellants, because of sundry fraudulent acts of the defendants and Jeanette Fensky and wrongfully withheld by them from the appellants; and for general relief. [Tr. pp. 3-27-29.] The appellants are lawful heirs of the said decedents, the complainants being sisters of the said Ferdinand Fensky and the intervenor being the sole surviving heir of a deceased

brother of the said Ferdinand Fensky. [Tr. pp. 266, 267.]

The facts are as follows:

The appellants Louisa Pickens, Johanna Schutt and Charles F. Fensky are, and have been for many years, residents and citizens, respectively, of the states of Kansas, Nebraska and Missouri. [Tr. pp. 266, 267.]

Ferdinand Fensky died intestate in Los Angeles county, state of California, on August 7th, 1903, leaving property in California, and in Topeka, Kansas, consisting of real property described in the complaint located in the counties of Los Angeles and Orange, state of California, and personal property consisting of promissory notes, mortgages and contracts for the sale of real property located in Topeka, Shawnee county, Kansas, cash in bank and in the hands of agents amounting to about $6,500, and that the entire property belonging to Ferdinand Fensky at the time of his death was worth about $80,000.

That at the time of the death of Ferdinand Fensky various persons in the state of Kansas were indebted to him on account of purchase money on real estate sold by him to said persons under the said contracts before mentioned, whereby he agreed to convey the real estate when the purchase price named in the contract was fully paid, and that at the time of his death there was unpaid a large amount under such contracts. That prior to his death the said Ferdinand Fensky and Jeanette Fensky executed deeds to contract purchasers but did not deliver the same.

That in October, 1903, Jeanette Fensky was appointed by the Superior Court of the county of Los Angeles, state of California, administratrix of the estate of Ferdinand Fensky, and that one M. T. Campbell, then residing at Topeka, Kansas, the agent and representative of the said Jeanette Fensky, was, on October 22nd, 1903, appointed administrator of the estate of the said Ferdinand Fensky by the Probate Court at Shawnee county, Kansas.

That after the appointment of the said Jeanette Fensky as administratrix, she came into possession of said promissory notes and cash in excess of $5,000 and of said real estate, and with the intent of deceiving and defrauding the plaintiffs and other heirs of Ferdinand Fensky, she caused the California real estate to be appraised and inventoried in the total sum of $6,000, and the personal property in the sum of $400, and purposely failed to list and inventory the cash and other personal property in her possession belonging to the said estate, and filed the said false inventory and appraisement.

That the said M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the county of Shawnee, state of Kansas, an inventory purporting to contain all the property coming into his hands as administrator of such estate, but purposely omitting from said inventory many of the notes and other personal property belonging thereto.

That the said Jeanette Fensky and M. T. Campbell entered into a fraudulent and collusive agreement for

the purpose of defrauding these plaintiffs and procuring from them their said interest in the estate of said Ferdinand Fensky without adequate consideration.

That pursuant to said scheme to defraud plaintiffs, said Campbell omitted from his said inventory any reference to any indebtedness due the said estate from purchasers of real property and listed the said real property as a portion of the estate of Ferdinand Fensky for the reason that the laws of the state of Kansas provided that real estate of an intestate husband dying without children descends directly to his widow, and no part of the same descends to the next of kin, and that the said Campbell and said Jeanette Fensky concealed the indebtedness due the said estate from the purchasers of said property.

That thereafter the said Jeanette Fensky delivered the deeds executed by the said Ferdinand Fensky in his lifetime to the said property to the said purchasers and received the money thereon due the estate of Ferdinand Fensky, or took mortgages back payable to herself, but did not cause the said money to be paid into the said estate of Ferdinand Fensky, but converted the same to her own use and benefit; nor did she ever account to the estate of said Ferdinand Fensky for the said mortgages.

That by means of the said false inventories filed in the estate of Ferdinand Fensky, deceased, in the states of California and Kansas, as aforesaid, and by false statements to these plaintiffs, the said Jeanette Fensky and the said Campbell represented that the estate of

said Ferdinand Fensky consisted only of property in California of the value of about $6,000 and property in the hands of Campbell amounting to about $20,000, when in truth and in fact, the California real estate owned by the said intestate at the time of his death was worth about $20,000 and the personal property in the hands of the said Jeanette Fensky was of the value of more than $50,000, and the personal property, including that which the said Jeanette Fensky had turned over to the said Campbell, in the state of Kansas, was of the value of more than $60,000.

That the said Campbell further represented to these plaintiffs that it would take a long time to close up the estate of Ferdinand Fensky; that many of the notes inventoried were of little and doubtful value, and that the cost of administration would amount to a considerable sum and that the amount that each of the plaintiffs might be entitled would not exceed the sum of $1,000; that the real estate in the state of Kansas belonging to the intestate all went to the widow and all the property left by the intestate was community property, and that if they wanted their share the said Jeanette Fensky would buy their said share for $1,000 each.

All of which statements were false and made for the purpose of inducing these plaintiffs to accept the proposition of the said Jeanette Fensky for the purchase of their interest in the said estate.

That at the time the said representations were made neither of the plaintiffs had any knowledge of the

actual facts as set out in the complaint, but relied upon the inventories filed in the said estate, and the representations so made to them, and believing the same to be true, accepted the sum of $1,000 each from the said Jeanette Fensky and executed to her releases and quitclaim deeds conveying to her all their right, title and interest in the said estate of their said deceased brother, Ferdinand Fensky.

That the said sum of $1,000 so paid to each of them was paid out of funds in the hands of the said Jeanette Fensky and the said Campbell belonging to the said estate of Ferdinand Fensky.

That the said Jeanette Fensky died in Los Angeles, California, July 8th, 1908. At the time of her death she was the owner of certain real estate described in the complaint and that all of the same had been purchased by her with money derived from the estate of Ferdinand Fensky.

That prior to her death the said Jeanette Fensky signed deeds to the said real estate, naming therein as grantees certain and various defendants in this action, but that the said deeds were not delivered to the said grantees.

That after the death of Jeanette Fensky the defendant J. H. Merriam, of Los Angeles, state of California, was appointed as administrator of her estate. That said J. H. Merriam filed an inventory in which it appears that the total assets of the said estate of Jeanette Fensky amounted to about $3,500, consisting entirely of personal property. That none of the said real estate

belonging to the said Jeanette Fensky at the time of her death, and described in the complaint, was inventoried in the said estate, nor was the same distributed by the said Superior Court of said Los Angeles county. He also omitted from said inventory and accounts the note of W. C. Stein, a note of Campbell and a note of George Fensky and a portion of the monies in the bank.

That the said J. H. Merriam was fully advised of the property belonging to the said Jeanette Fensky at the time of her death and had full knowledge of the rights of the complainants herein.

That after the estate had been closed the said J. H. Merriam was requested to continue the administration of the said estate, but failed, refused and neglected so to do.

All the estate of Ferdinand Fensky was at the time of his death his separate property, and as such, on the death of his widow, the estate in her hands descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky.

That plaintiffs have received nothing from the estate of their said deceased brother Ferdinand Fensky, excepting said sum of $1,000 each.

That neither of the complainants ever had any notice of the fraud so perpetrated upon them until July, 1912. That thereupon they commenced an investigation which developed the facts as hereinbefore set forth.

The complaint prays that an account be taken of all the property of the said Ferdinand Fensky, deceased;

That the pretended deeds of release and of claim executed by these claimants to the said Jeanette Fensky be declared fraudulent and void and of no effect, and that an account be taken of the estate of said Jeanette Fensky.

That the deeds of Jeanette Fensky to the other defendants be decreed null and void and that the defendant J. H. Merriam be required to account to the plaintiffs for their distributive share of the said estate of Jeanette Fensky, and for such other, further and general relief as to the court may seem equitable and just.

There is no conflict in the evidence concerning the facts as to any material circumstance. The greater portion of the evidence is in documentary form, and this court has the same means of judging the same as had the trial court.

Specification of Errors.

The appellants now assign the following errors which the said appellants aver occurred in the proceedings in and upon the trial of this cause and particularly appearing in the record herein upon which they rely to reverse the decree rendered and entered herein, and the appellants aver that in the record and proceedings of this cause there is manifest error and the said decree is erroneous and is against the just rights of the appellants in the following respects:

The court erred in the following particulars, to-wit:

1. In not decreeing that the complainant, Louisa Pickens, was at the time of the filing of the bill of

complaint herein a citizen and resident of the state of Kansas.

2. In not decreeing that the complainant, Johanna Schutt, was at the time of the filing of the bill of complaint herein a citizen and resident of the state of Nebraska.

3. In not decreeing that the intervenor, Charles F. Fensky, was and is the only son and heir at law of Charles Fensky, and that the said Charles F. Fensky was, at the time of the filing of the bill of complaint herein and at the time of the filing of the amended petition for intervention herein, a citizen and resident of the state of Missouri.

4. In not decreeing that at the time of the filing of the bill of complaint herein the defendants were all citizens and residents of the state of California and of the Southern District and Division thereof.

5. In not decreeing that the real estate described in the bill of complaint, and in the amended bill of complaint, herein was situated in the state of California and in the Southern District and Division thereof.

6. In not decreeing that the amount in controversy in this action exceeds and exceeded the sum or value of $3,000.00, exclusive of interest and costs.

7. In not decreeing that the complainants herein are surviving sisters and heirs at law of Ferdinand Fensky, who died intestate at San Pedro, Los Angeles county, California, on August 7th, 1903.

8. In not decreeing that the said Ferdinand Fensky never had any children and that he left as his only heirs at law the complainants, Louisa Pickens and Johanna Schutt, both sisters of the decedent; Jeanette Fensky, his widow, who died prior to the filing of the bill of complaint herein; Frederick Fensky, a brother; Ida Wendt, a sister, who died prior to the filing of the said bill of complaint; Hulda Richter, a sister; Augusta Krauss, a sister; Charles Fensky, a brother, and George Fensky, a son of a brother of the said decedent who died during the lifetime of the said Ferdinand Fensky.

9. In not decreeing that the said Ida Wendt died, intestate, subsequently to the death of the said Ferdinand Fensky, and that she left a son, Conrad Wendt, as her sole heir at law, and that after the death of the said Ferdinand Fensky, and of the said Ida Wendt, and prior to the filing of the bill of complaint herein, the said Conrad Wendt died unmarried, intestate and without issue or direct heirs.

10. In not decreeing that subsequently to the death of the said Ferdinand Fensky, the said Charles Fensky died, intestate, leaving the intervenor, Charles F. Fensky, as his sole surviving heir at law and next of kin, and the said Charles F. Fensky succeeded to all of the interest of the said deceased Charles Fensky in and to the estate of the said Ferdinand Fensky.

11. In not decreeing that each of the complainants, Louisa Pickens and Johanna Schutt, as maternal aunt of the said Conrad Wendt, succeeded to one-seventh of

the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, deceased, and in the property described in the bill of complaint herein.

12. In not decreeing that the intervenor, Charles F. Fensky, succeeded to one-seventh of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky, deceased, and in the property described in the bill of complaint herein.

13. In not decreeing that at the time of the death of the said Ferdinand Fensky, he was the owner of the following described real estate, to-wit:

(A) A piece or parcel of land situated in the city of Los Angeles, California, being as follows: Commencing at a point on the west line of New High street distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly at right angles to said west line of New High street 65 feet to a point; thence northeasterly at right angles to the last mentioned course parallel with and distant from the west line of New High street 73 feet to a point; thence 65 feet easterly to the west line of New High street to the point of beginning; being parts of lots 10 and 11 in block 33, of Ord's Survey, as recorded in book 55, page 66, miscellaneous records of Los Angeles county, California.

(B) Lots 19 to 29 inclusive in block C, Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles county, California.

(C) Lots 9 and 10 of Peck's Subdivision of block 74 in said city of San Pedro, Los Angeles county, California.

(D) The west half of the southwest quarter of the northwest quarter of section 24, township 5 south, range 10 west, S. B. M., in Orange county, California.

(E) The north ten (10) acres of the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 4, township 5 south, range 10 west, S. B. M., in Orange county, California.

14. In not decreeing that about two or three months before the death of the said Ferdinand Fensky, he sold to one John Davis, under contract of sale, the south thirty (30) acres of the southwest quarter of the southeast quarter of section 4, township 5 south, range 10 west, S. B. M., in Orange county, California, for the sum of $1,700.00; that the said Davis paid the sum of $50.00 to the said Ferdinand Fensky, and paid the remainder of the purchase price to Jeanette Fensky, or her agent, after the death of Ferdinand Fensky.

15. In not decreeing that at the time of the death of the said Ferdinand Fensky, he owned and possessed promissory notes aggregating about $24,647.64 in face value, executed by various persons and payable at various times, as set forth in the said notes.

16. In not decreeing that at the time of the death of the said Ferdinand Fensky, various persons were indebted to him on account of purchase money on real estate sold by him to such persons during his lifetime.

17. In not decreeing that at the times the said real estate was sold the said Ferdinand Fensky executed to the purchasers thereof contracts for deeds whereby he agreed to convey the real estate described therein upon the full payment of the purchase price.

18. In not decreeing that at the time of the death of the said Ferdinand Fensky, there was unpaid a large amount of the purchase price of the various pieces of real estate sold by the said Ferdinand Fensky on contract of sale during his lifetime.

19. In not decreeing that at the time of the death of the said Ferdinand Fensky there was unpaid on account of contracts for the sale of real estate executed by the said Ferdinand Fensky in his lifetime, covering real property owned by him in his own right in Topeka, Shawnee county, Kansas, the total sum of about $22,965.75.

20. In not decreeing that Jeanette Fensky, the wife of Ferdinand Fensky, joined with the said Ferdinand Fensky in the execution of all contracts for the sale of real estate executed by the said Ferdinand Fensky, and that she consented in writing to the execution of all such contracts executed by the said Ferdinand Fensky.

21. In not decreeing that at the time of the death of the said Ferdinand Fensky, he possessed cash in the bank and in the possession of other persons amounting to about $2,756.57.

22. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, lots 19 to 29 inclusive in block C of the Peck's Subdivision of the Carolina Tract in the city of San Pedro, Los Angeles county, California, were reasonably worth the sum of $4,000.00.

23. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, lots 9 and 10 of Peck's Subdivision of block 74, in the city of San Pedro, Los Angeles county, California, was reasonably worth the sum of $10,000.00.

24. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the west half of the southwest quarter of the northwest quarter of section 24, T. 5 S., R. 10 W., S. B. M., in Orange county, California, was reasonably worth the sum of $1,000.00.

25. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the north ten (10) acres of the southwest quarter of the southeast quarter and the south half of the northwest quarter of the southeast quarter of section 4, T. 5 S., R. 10 W., S. B. M., in Orange county, California, was reasonably worth the sum of $1,500.00.

26. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of

Ferdinand Fensky, deceased, the contract of sale to John Davis for the south thirty (30) acres of the southwest quarter of the southeast quarter of section 4, T. 5 S., R. 10 W., S. B. M., in Orange county, California, was reasonably worth the sum of $1,650.00.

27. In not decreeing that at the time of the filing of the inventory and appraisement of the estate of Ferdinand Fensky, deceased, the whole of the property and estate owned and possessed by the said Ferdinand Fensky at the time of his death was reasonably worth the sum of about $86,869.96.

28. In not decreeing that on October 15th, 1903, Jeanette Fensky was, by the Superior Court of the state of California, in and for the county of Los Angeles, appointed, and that she became administratrix of the estate of the said Ferdinand Fensky, deceased, and that she duly qualified and thereafter acted as such until the final settlement of the said estate.

29. In not decreeing that upon the death of the said Ferdinand Fensky, the said Jeanette Fensky came into the possession of about the sum of $2,756.57 in cash and promissory notes aggregating a total of about $24,647.64 and that she came into possession of all of the contracts of sale of real estate and of all evidences of indebtedness due to the said Ferdinand Fensky at the time of his death, upon which there was then owing and unpaid about the sum of $22,965.75.

30. In not decreeing that, as administratrix of the estate of the said Ferdinand Fensky, deceased, the said Jeanette Fensky came into possession of the real estate

owned by the said decedent at the time of his death in the state of California.

31. In not decreeing that the said Jeanette Fensky knew the value of the said real estate in the state of California, and the contract of sale to John Davis, to be about the sum of $28,750.00, and, designing to deceive and to defraud the complainants and the other heirs at law of the said Ferdinand Fensky, deceased, the said Jeanette Fensky caused the said real estate in California to be falsely and fraudulently appraised and inventoried for a total sum of $6,200.00.

32. In not decreeing that the said Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, did not return to the said Superior Court a true inventory of the personal property belonging to the said estate and that she inventoried only one promissory note for the sum of $400.00, and did not inventory any of the other promissory notes or any of the contracts for the sale of real estate or other evidences of indebtedness belonging and owing to Ferdinand Fensky at the time of his death, or then belonging and owing to the said estate.

33. In not decreeing that the said Jeanette Fensky, with a design to mislead, deceive and defraud the complainants and the other heirs of the said Ferdinand Fensky, deceased, purposely failed to list and inventory any cash belonging to the said decedent which came into her possession, and also purposely failed to inventory any contracts or other evidences of indebt-

edness due to the said decedent from purchasers of real estate.

34. In not decreeing that the inventory of the estate of the said Ferdinand Fensky, deceased, was signed by the said Jeanette Fensky as administratrix of the said estate of Ferdinand Fensky, deceased, and was by her presented to the Superior Court of the state of California, in and for the county of Los Angeles, as and for a true inventory of the estate of the said decedent, and that in truth and in fact the same was false and fraudulent and did not contain a large amount of property belonging to the said estate, and that the said inventory was intended by the said Jeanette Fensky to deceive the complainants as sisters and heirs at law and the other heirs of the said Ferdinand Fensky, deceased, including Charles Fensky, into the belief that the said estate consisted of nothing but the property in the said inventory and appraisement described and valued in the said inventory and appraisement and thereby to induce the said complainants and the said Charles Fensky and the other heirs to relinquish their just claims to their respective shares of the said estate.

35. In not decreeing that after the death of the said Ferdinand Fensky, the said Jeanette Fensky, with the design to deceive and to defraud the complainants and the other heirs at law of the said Ferdinand Fensky, deceased, including the said Charles Fensky, sent all of the promissory notes and all contracts and all

evidences of indebtedness due to the said Ferdinand Fensky, deceased, to M. T. Campbell, who then resided at Topeka, Shawnee county, Kansas; that the said M. T. Campbell was the agent and representative in the said state of Kansas of the said Jeanette Fensky; that the said Jeanette Fensky entered into a fraudulent and collusive agreement with the said Campbell, whereby he should act as her agent and representative in obtaining releases from the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased; that pursuant to such agreement, and for the purpose of carrying it out, the said Jeanette Fensky procured the said Campbell, by virtue of certain proceedings in the Probate Court of Shawnee county, Kansas, which was a court of record, then and there having jurisdiction of estates of deceased persons, to be, and he was, on September 9th, 1903, appointed administrator of the estate of the said Ferdinand Fensky, deceased.

36. In not decreeing that on or about October 22nd, 1903, M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, filed in the Probate Court of Shawnee county, Kansas, an inventory which was represented by him to be a true inventory of all the goods, chattels, rights and credits of Ferdinand Fensky, deceased, which were by law to be administered in Kansas, and also an inventory of the real estate of Ferdinand Fensky, which said inventory showed personal property amounting to $20,927.64, consisting of $4,297.14 cash in hand, and showed a

portion, but not all, of the promissory notes owing and belonging to the said estate, and that the said Campbell wholly failed to list in the said inventory a promissory note signed by W. C. Stein for the sum of $2,400.00 and a promissory note executed by one Simms for the sum of $420.00 and a promissory note executed by one Kimmerle for the sum of $500.00, and that the said Campbell purposely omitted from the said inventory any reference to any indebtedness due to the said estate from purchasers of real estate under contracts of sale in Shawnee county, Kansas.

37. In not decreeing that the real estate sold by Ferdinand Fensky during his lifetime, and for which the purchasers thereof were indebted to him, and after his death to his estate, was situated in and near the city of Topeka, Shawnee county, Kansas, and consisted in part of what was known as Fensky's First and Second Additions, about twelve acres in Kaw Reserve number 5, lot 61 on Kansas Avenue South, and part of lot 71 on Kansas Avenue North.

38. In not decreeing that the Kansas law regulating the descent and distribution of property at the time of the death of Ferdinand Fensky and at the time of the filing of the inventory of the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee county, Kansas, provided that real estate of an intestate husband dying without children descends directly to his widow and no part thereof descends to his next of kin, and that, well knowing the provisions of the said law, and pursuing a design to deceive and to de-

fraud the complainants herein and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, the said Jeanette Fensky and M. T. Campbell listed as real estate in the inventory filed in the Probate Court of Shawnee county, Kansas, the real estate sold by the said Ferdinand Fensky in his lifetime under contracts of sale to purchasers of the said real estate; that the said Jeanette Fensky and the said M. T. Campbell knew that none of the contracts of sale of the said real estate had been recorded and knew that the complainants and the said Charles Fensky and the other heirs at law had no knowledge that the said real estate had been sold, and that the said Jeanette Fensky and the said Campbell concealed the fact that any of the said real estate had been sold, and, by listing the same as real estate, falsely represented to the complainants and to the said Charles Fensky and to the other heirs at law of the said Ferdinand Fensky, deceased, that, under the laws of the state of Kansas, the real estate so sold belonged to the widow of the said Ferdinand Fensky, deceased, and that the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, had no interest therein.

39. In not decreeing that it was the duty of Jeanette Fensky, as administratrix of the estate of the said Ferdinand Fensky, deceased, in California, and that it was the duty of M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, under the laws of both California and Kan-

sas, to inventory and to account for the indebtedness due to the said estate from purchasers of real estate under contracts of sale as personal assets of the said Ferdinand Fensky, deceased, distributable according to the law of California applicable to separate property of a deceased husband dying in California without issue, and leaving a widow and brothers and sisters.

40. In not decreeing that for the purpose of carrying out the fraudulent design of securing from the complainants and from the said Charles Fensky and from the other heirs at law of the said Ferdinand Fensky, deceased, by misrepresentation and fraud, a release of their lawful claims against the said estate, Jeanette Fensky and M. T. Campbell concealed from the said complainants and from the said Charles Fensky and from the other heirs at law, the existence of any indebtedness owing to the said estate from purchasers under contracts of sale of real estate and omitted from the inventory of the said estate in California, and from the inventory of the said estate in Kansas, all indebtedness owing to the said estate on account of contracts of sale of real estate, and stated in the said inventories and otherwise that the said estate was actually Kansas real estate owned by the said Ferdinand Fensky, deceased, at the time of his death, and as such descended to and belonged solely to the said Jeanette Fensky.

41. In not decreeing that under the laws of the state of Kansas where a vendor in a contract of sale of real estate dies without having executed a deed to

the purchaser upon the payment to the administrator of his estate of the unpaid balance of the purchase money, the administrator was and is authorized, and might and may be directed by the Probate Court to execute such deed with the same effect as though it had been executed by the vendor; that; prior to his death, the said Ferdinand Fensky and the said Jeanette Fensky drew up and signed deeds of conveyance to the several purchasers holding contracts of sale of real estate from the said Ferdinand Fensky, but did not deliver the same; that all of the said undelivered deeds came into the hands of the said Jeanette Fensky upon the death of the said Ferdinand Fensky; that the said Jeanette Fensky and M. T. Campbell knew that the execution by the said Jeanette Fensky or by the said Campbell, as administrator of the estate of the said Ferdinand Fensky of the deeds to the said purchasers, or any of them, would reveal the fact that the said real estate had been sold and that the purchase money unpaid on account of contracts of sale constituted personal property of the said estate; that the said Jeanette Fensky and the said Campbell soon after the appointment of Jeanette Fensky as administratrix of the estate of Ferdinand Fensky, deceased, in California, and the appointment of the said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, began negotiations with the persons who, during the lifetime of the said Ferdinand Fensky, had purchased real estate from him in Kansas under contracts of sale to accept the said undelivered

deeds notwithstanding the death of the said Ferdinand Fensky, and to execute to the said Jeanette Fensky mortgages for the amount of the unpaid purchase money due under the said respective contracts of sale; that substantially all of the persons who had purchased real estate from the said Ferdinand Fensky under contracts of sale accepted the said proposition, and the said deeds, all of which were dated, signed and acknowledged prior to the death of the said Ferdinand Fensky, were by the said Jeanette Fensky, through the said Campbell, delivered to the said respective purchasers and they executed to the said Jeanette Fensky mortgages for the respective unpaid balances of the purchase money; that the said Jeanette Fensky and the said Campbell for the purpose of deceiving and defrauding the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, and for the purpose of inducing the said complainants and the said Charles Fensky and the other heirs at law to relinquish their just claims to their respective shares of the estate of the said Ferdinand Fensky, deceased, omitted from the inventory of the said estate in Kansas and from the inventory of the said estate in California any reference to any of the said mortgages, and that neither the said Jeanette Fensky nor the said Campbell, nor anyone else representing the estate of the said Ferdinand Fensky, accounted to the complainants or to the said Charles Fensky, or to the other heirs at law for any part or share of the said mortgages, or any of them,

or the proceeds thereof, and that the same remain and are unadministered assets of the estate of the said Ferdinand Fensky, deceased, in which the complainants and the intervenor and the other heirs at law had and have an interest as heirs at law of the said decedent.

42. In not decreeing that by means of the inventory filed by Jeanette Fensky in the estate of Ferdinand Fensky, deceased, in the Superior Court of the state of California, in and for the county of Los Angeles, and by means of the inventory filed by M. T. Campbell in the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee county, Kansas, and by written statements made by them, and by oral statements made by the said Campbell, they represented that the estate of the said Ferdinand Fensky consisted of property situated in California of the value of about $6,700.00 and property in the hands of the said Campbell amounting to about $20,927.64, and represented that of the said estate, the widow, Jeanette Fensky, was entitled to one-half and that the remaining half was subject to distribution among the other heirs at law of the said Ferdinand Fensky, deceased, and represented that, according to the inventories prepared by them, the widow would receive about $10,000.00 from the property in the hands of the said Campbell and about $3,000.00 from property in her hands in California, and in addition thereto that the widow was entitled to the real estate situated in the state of Kansas described in the said Campbell's inventory filed

in the estate of Ferdinand Fensky, deceased, in the Probate Court of Shawnee county, Kansas; that the said Jeanette Fensky and the said M. T. Campbell well knew, and it was a fact, that the California real estate owned by the said Ferdinand Fensky at the time of his death was worth about $28,750.00, and the personal property in California in the hands of the said Jeanette Fensky, including that which the said Jeanette Fensky turned over to the said Campbell for administration in the state of Kansas, was of the total value of about $50,469.96; that almost immediately after the death of the said Ferdinand Fensky, the said Campbell began the collection of moneys due on account of promissory notes owing to the said Ferdinand Fensky and on account of contracts of sale of real estate made by the said Ferdinand Fensky in his lifetime; that prior to July, 1904, the said Campbell had collected of assets belonging to the estate of the said Ferdinand Fensky, deceased, either in cash or well secured mortgage notes, more than $11,800.00; that from time to time the said Campbell without the knowledge or consent of the complainants, or of the said Charles Fensky, or of any of the other heirs at law of the said Ferdinand Fensky, deceased, remitted to the said Jeanette Fensky large sums of money and retained other large sums of money in his hands for the purpose of carrying out the design and intent of securing for the said Jeanette Fensky the shares of the estate of the said Ferdinand Fensky, deceased, to which the complainants and the said Charles Fensky

and the other heirs at law were justly entitled; that within a short time after the appointment of the said Campbell as administrator of the estate of Ferdinand Fensky, deceased, in the state of Kansas, he represented to the complainants, and to the said Charles Fensky, and to the other heirs at law of the said Ferdinand Fensky, deceased, that it would take a long time to close up the estate of the said Ferdinand Fensky and that many of the promissory notes inventoried by him were of little or doubtful value, and that the makers of the said notes were accustomed to taking time for the payment of the same, and that the cost of administration would amount to a considerable sum, and that even if he should be able to collect the said notes, the shares of the said estate to which each of the complainants and the said Charles Fensky might be entitled would not exceed the sum of $1,000.00; that the said Campbell further represented that the real estate in and near Topeka, Kansas, all went to the widow, and that the property left by the said Ferdinand Fensky, deceased, was community property to which the said Jeanette Fensky was entitled to one-half absolutely, and that if the said complainants and the said Charles Fensky and the other heirs at law wanted their shares, the said Jeanette Fensky would buy from the complainants and from the said Charles Fensky their claims against the said estate for $1,000.00 each; that each, all and every of the said representations was false, fraudulent and misleading and was by the said Campbell and by the said Jeanette

Fensky known to be false, fraudulent and misleading; that the said promissory notes were all good and collectible; that the said Ferdinand Fensky left no debts and there was no just reason why the estate should not be closed, and final distribution made within reasonable time; that the amount which the complainants and the said Charles Fensky and the other heirs at law of the said Ferdinand Fensky, deceased, were entitled to receive from the said estate upon a full disclosure and accounting was about the sum of $4,951.25 each; that the said property left by the said Ferdinand Fensky was not community property, but was his separate property; that the cost of administration ought to have been comparatively small and not exceeding the amount authorized by law; that the value of the estate was about $86,869.96, instead of about $24,000.00 as represented by the said Campbell and the said Jeanette Fensky; that, at the time the aforesaid representations were made, the complainants and the said Charles Fensky and the other heirs at law had no knowledge of the actual facts as herein stated, but relied upon the said inventories and the said representations so made to them and believed the same; that, believing the said representations, the complainant, Louisa Pickens, on or about July 29th, 1904, accepted the sum of $1,000.00 then paid to her by the said Campbell, and signed and delivered to him for the said Jeanette Fensky a transfer, release and quitclaim conveying to the said Jeanette Fensky of all the right, title and interest of the said Louisa Pickens in and to all property

of the estate of the said Ferdinand Fensky, deceased; that on or about August 3rd, 1904, the complainant, Johanna Schutt, relying on and believing the said inventories and the said representations made to her, accepted the sum of $1,000.00 then paid to her by the said Campbell and signed and delivered to him for the said Jeanette Fensky a transfer, release and quitclaim conveying to the said Jeanette Fensky all the right, title and interest of the said Johanna Schutt in and to all property, assets and estate of the said Ferdinand Fensky, deceased; that on or about the 25th day of July, 1904, Charles Fensky, the father of the intervenor, Charles F. Fensky, relying on and believing the said inventories and the said representations, accepted the sum of $1,000.00 then paid to him by the said Campbell and signed and delivered to the said Campbell for the said Jeanette Fensky a similar transfer, release and quitclaim, releasing and conveying to the said Jeanette Fensky all of the right, title and interest of the said Charles Fensky in and to the property, assets and estate of the said Ferdinand Fensky, deceased; that the sum of $1,000.00 so paid to each of the complainants and to the said Charles Fensky, as their respective full shares of the said estate, and for which they signed the said releases and quitclaim deeds, is all that either of the complainants or the said Charles Fensky ever received from the said estate of the said Ferdinand Fensky, deceased; that the said sums were so paid to the said complainants and to the said Charles Fensky by the said Campbell out of funds

in his hands collected from the assets of the said estate; that the said Jeanette Fensky did not advance or pay anything whatsoever for the said releases and quitclaims, or for any of them; that the sum of $1,000.00 received by each of the complainants and by the said Charles Fensky was only a part of the money then due to them, respectively, from the said estate of the said Ferdinand Fensky, deceased, and that the said Jeanette Fensky parted with nothing of value for the said releases and quitclaims; that the said instruments executed by the said complainants and by the said Charles Fensky were, and are, and each of them was and is ineffective, without consideration and wholly fraudulent and void, for that the same were secured from the complainants and from the said Charles Fensky, and from each of them, upon the faith of the aforesaid false, fraudulent and misleading misrepresentations, statements, and representations made by the said Jeanette Fensky and by the said Campbell; that if the complainants and the said Charles Fensky had known or had any suspicion of the truth, no one of them would have executed the said or any releases and quitclaims, but would have insisted upon receiving their several respective full shares of the said estate.

43. In not decreeing that prior to March 30th, 1905, M. T. Campbell remitted to Jeanette Fensky about $20,000.00 in cash and secured notes, being the proceeds of the assets of the estate of Ferdinand Fensky, deceased, which came into the hands of the said

Campbell; that on or about March 30th, 1905, the said Jeanette Fensky filed in the Superior Court of the state of California, in and for the county of Los Angeles, a final account in the estate of the said Ferdinand Fensky, deceased, in which she represented that she had secured the interests of all of the brothers and sisters and other heirs at law of the said Ferdinand Fensky, deceased, and that she was the only one entitled to the said estate; that no part of the said amount was included in her said account; that there then being no debts due from the said Ferdinand Fensky, deceased, and there being no opposition to the said final account, the same was received and approved by the said Superior Court and an order was entered discharging the said Jeanette Fensky as administratrix of the said estate and closing the said estate; that the said Jeanette Fensky thereupon caused to be filed for record in Los Angeles county and in Orange county, California, the releases and quitclaim deeds that had been executed by the complainants and by Charles Fensky, the father of the intervenor, Charles F. Fensky, and by the other heirs at law of the said Ferdinand Fensky, deceased; that upon the faith of the same the said Jeanette Fensky secured purchasers of the property in Orange county, California, and also of some of the property in San Pedro, California; that with the money and mortgages received from the said Campbell in the circumstances herein set forth, and with the money derived from the sale of the said real estate in California, the said Jeanette Fensky pur-

chased real estate in Los Angeles county, California, and at the time of her death in 1908 she was the owner of the following described real estate, to-wit:

Item 1. The north 66 feet of the east 200 feet of lot 80, L. H. Michner's subdivision of the north 38 acres in block U of Painter & Ball's Addition to Pasadena, California.

Item 2. Lot 6 in block A, New Fair Oaks Avenue Tract, Pasadena, California.

Item 3. Lot 12 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4. That portion of lot "O" of the San Pasqual Tract, in Pasadena, California, described as follows: Beginning at a point in the east line of lot four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

Item 5. Lot 2 of the F. E. Crawford Tract, in Pasadena, California.

Item 6. Lot 16 of S. H. Doolittle's subdivision of lot 21 of B. F. Ball's subdivision, in Pasadena, California.

Item 7. Lot 10, Peck's subdivision of block 74, in San Pedro, California.

Item 8. A piece of property in New High street, in the city of Los Angeles, county of Los Angeles, state of California, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly and at right angles to said west line of said New High street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High street to point of beginning; being parts of lots 10 and 11, in block 33 of Ord's Survey, according to the map in book 53, page 68, miscellaneous records of Los Angeles county, California.

Item 9. The portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street.

Item 10. The south fifty feet of the north one hundred feet of lot eight, and the south fifty feet of the north one hundred feet of the west ten feet of lot seven of L. A. Michner's subdivision of lots fourteen to seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.

Item 11. Lot 24 of Mary H. Newton Tract, in Pasadena, California.

Item 12. Lot 7 in block A of G. Weingarth's subdivision B of the San Gabriel Orange Association Lands in Pasadena, California.

44. In not decreeing that prior to the death of the said Ferdinand Fensky, the said Jeanette Fensky had no money or property whatsoever, and that all of the property, including the real estate in Pasadena, California, owned by her at the time of her death was acquired by the use of money and assets belonging to the estate of the said Ferdinand Fensky, deceased, and which was owned by the said Ferdinand Fensky in his lifetime in his own right and as his separate property.

45. In not decreeing that the said Jeanette Fensky died on July 8th, 1908; that prior to her death and on or about September 18th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Amanda Katzung, certain real property on New High street in the city of Los Angeles, California, and described as follows:

A piece of property in New High street, in the city of Los Angeles, county of Los Angeles, state of Cali-

fornia, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly and at right angles to said west line of said New High street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High street 73 feet to a point; thence easterly by a straight line 65 feet to the west line of New High street to point of beginning; being parts of lots 10 and 11, in block 33 of Ord's Survey, according to the map in book 53, page 68, miscellaneous records of Los Angeles county, California; that on or about September 8th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the said Amanda Katzung lot 10 in Peck's subdivision of block 74, San Pedro, California; that at or about the same time, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant, Eugene Wellke, real estate situated in the state of Kansas; that with funds received from M. T. Campbell, which were the proceeds of the estate of Ferdinand Fensky, deceased, in the state of Kansas, and with funds arising from the sale of the real property in Orange county, acquired by the said Jeanette Fensky from the said estate of Ferdinand Fensky, deceased, the said Jeanette Fensky, on or about May 28th, 1907, purchased the north

60 feet of the east 200 feet of lot 8 in Michner's subdivision of the northeast 38.86 acres in block U of Painter & Ball's Addition to Pasadena, California, and thereafter signed a deed purporting to convey to the defendant Alma J. Schmidt the said last mentioned property.

46. In not decreeing that on or about August 14th, 1908, on the petition of the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the defendant J. H. Merriam was appointed by the Superior Court of the state of California, in and for the county of Los Angeles, administrator of the estate of Jeanette Fensky, deceased; that in the said petition it is alleged that the whole of the property of the said Jeanette Fensky at the time of her death consisted of about $2,300.00 in money; that for some time after his appointment as administrator of the said estate, the said J. H. Merriam took no steps whatsoever looking to the administration of the said estate, but on September 8th, 1909, he filed in the said estate an inventory from which it appears that the total assets of the said estate of the said Jeanette Fensky, deceased, amounted to $3,509.38, consisting of $2,324.38 in cash, a claim against Mrs. Katzung for $135.00 and a note of the defendant Don Ferguson for $1,050.00; that upon the filing of the said inventory and upon September 8th, 1909, the defendant J. H. Merriam filed his final account of the said estate and in the said final account represented that the property of the said Jeanette Fensky in the course of administration in the Probate

Court of Shawnee county, Kansas, had been wholly administered and distributed; and further represented that the said Jeanette Fensky left as her sole heirs at law the defendants Eugene Wellke, Amanda Katzung and Alma J. Schmidt.

47. In not decreeing that at the time the defendant J. H. Merriam filed his final account in the estate of Jeanette Fensky, deceased, he knew that the said Jeanette Fensky at the time of her death owned the real estate hereinafter described and knew that the same was distributable among the brothers and sisters of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky, and the descendants of deceased brothers and sisters of the said Ferdinand Fensky, by right of representation, and knew that neither the said Eugene Wellke nor the said Amanda Katzung nor the said Alma J. Schmidt had any interest whatsoever in the said real property or in any thereof, the said real property being described as follows:

Item 1. The north 66 feet of the east 200 feet of lot 80, L. H. Michner's subdivision of the north 38 acres in block U of Painter & Ball's Addition to Pasadena, California.

Item 2. Lot 6 in block A, New Fair Oaks Avenue Tract, Pasadena, California.

Item 3. Lot 12 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, Pasadena, California.

Item 4. That portion of lot "O" of the San Pasqual Tract in Pasadena, California, described as follows:

Beginning at a point in the east line of lot four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning.

Item 5. Lot 2 of the F. E. Crawford Tract, in Pasadena, California.

Item 6. Lot 16 of S. H. Doolittle's subdivision of lot 21 of B. F. Ball's subdivision of Pasadena, California.

Item 7. Lot 10, Peck's subdivision of block 74, in San Pedro, California.

Item 8. A piece of property in New High street, in the city of Los Angeles, county of Los Angeles, state of California, described as follows: Commencing at a point on the west line of New High street, distant 200 feet southwest from the southwest corner of Alpine street and New High street; thence southwesterly along the west line of New High street 73 feet to a point; thence westerly and at right angles to said west line of said New High street 64 feet to a point; thence northeasterly and at right angles to said last mentioned course and distance and parallel with the west line of New High street 73 feet to a point; thence easterly by a straight line 65 feet to a point; thence easterly by a straight line 65 feet to the west line of New High street to point of beginning; being

parts of lots 10 and 11, in block 33 of Ord's Survey, according to the map in book 53, page 68, miscellaneous records of Los Angeles county, California.

Item 9. The portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street.

Item 10. The south fifty feet of the north one hundred feet of lot eight, and the south fifty feet of the north one hundred feet of the west ten feet of lot seven of L. A. Michner's subdivision of lots fourteen to seventeen, both inclusive, of the Summit Avenue Tract, in Pasadena, California.

Item 11. Lot 24 of Mary H. Newton Tract, in Pasadena, California.

Item 12. Lot 7 in block A of G. Weingarth's subdivision B of the San Gabriel Orange Association lands in Pasadena, California;

that the said Merriam well knew and it was, and is, a fact that some time prior to her death, about September 18, 1907, the said Jeanette Fensky made out and signed deeds purporting to convey the said property owned by her as follows:

A deed to Alma J. Schmidt of the real estate described herein as item 1 of the real estate owned by Jeanette Fensky at the time of her death;

A deed to Eugene Wellke of the real estate described in item 2;

A deed to Minnie S. Farnsworth of the real estate described in item 3;

A deed to the defendant Eugene Wellke of the real estate described in item 4;

A deed to the defendant Amanda Katzung of the property described in item 5;

A deed to the defendant Alma J. Schmidt of the real estate described in item 6;

A deed to the defendant Amanda Katzung of the real estate described in item 7;

A deed to the defendant Amanda Katzung of the property described in item 8;

A deed to the defendant Eugene Wellke of the real estate described in item 9;

A deed to the defendant Corrine Loveland of the property described in item 10;

A deed to the defendant Eugene Wellke of the property described in item 11;

A deed to the defendant Eugene Wellke of the property described in item 12;

that none of the deeds so made out and signed by the said Jeanette Fensky were delivered to the respective grantees named therein until after the death of the said Jeanette Fensky; that the title and ownership of the said property did not pass to the said grantees or

to any of them; that at the time of her death the said Jeanette Fensky was the owner of all of the said real property; that the defendant J. H. Merriam well knew all of the facts herein set forth and, knowing the same, wholly omitted the said property and all of the same from his inventory and accounts in the estate of the said Jeanette Fensky, deceased, and pretended to make distribution of the estate of the said Jeanette Fensky and paid over to each of the defendants, Eugene Wellke, Amanda Katzung and Alma J. Schmidt, the sum of $235.61 out of the assets of the said estate, and also turned over to them certain notes and other property belonging to the said Jeanette Fensky.

48. In not decreeing that the defendant J. H. Merriam, while acting as administrator of the estate of Jeanette Fensky, deceased, was employed by and acted as attorney and agent for the defendants Eugene Wellke, Amanda Katzung, Minnie S. Farnsworth and Alma J. Schmidt, and that at the same time the said defendant, Merriam, had full knowledge of the rights of the complainants and of the intervenor herein in and to the estate of Jeanette Fensky, deceased, and of the other brothers and sisters of Ferdinand Fensky, deceased, and the descendants of deceased brothers and sisters of the said Ferdinand Fensky, and that the said defendant, Merriam, purposed and designed to prevent the complainants and the intervenor and the other heirs at law from securing their just shares of the said estate of the said Ferdinand Fensky, deceased, and of the said Jeanette Fensky, deceased.

49. In not decreeing that the defendant J. H. Merriam, although acting as administrator of the estate of Jeanette Fensky, deceased, and although requested so to do, made and has made no effort to represent the said estate or to have the administration thereof continued by the Superior Court of the state of California, in and for the county of Los Angeles, and has failed, refused and neglected further to administer the said estate and that he denies the rights of the complainants and of the intervenor herein and of the other heirs at law in respect thereof.

50. In not decreeing that all of the estate of Ferdinand Fensky, deceased, was his separate property, and as such upon the death of his widow, Jeanette Fensky, the said estate and its avails descended ratably to the surviving brothers and sisters of the said Ferdinand Fensky and not to the sisters and brother of the said Jeanette Fensky.

51. In not decreeing that the complainants herein have not received from the estate of their deceased brother, Ferdinand Fensky, anything except the sum of $1,000.00 each, paid to them by M. T. Campbell, and that Charles Fensky, the father of the intervenor, Charles F. Fensky, did not receive from the estate of the said Ferdinand Fensky, deceased, anything except the sum of $1,000.00, paid to him by the said M. T. Campbell, and that the said intervenor has not received anything whatsoever from the said estate of Ferdinand Fensky, deceased.

52. In not decreeing that the defendant Minnie S. Farnsworth is a daughter of the defendant Eugene Wellke, and claims to be the owner of lot 12 of A. F. Mills subdivision of the north half of lot 6 of the Berry and Elliott Tract, Pasadena, California, by virtue of a certain deed signed by the said Jeanette Fensky in her lifetime but which was not delivered prior to her death, and that whatever right, title or interest the said defendant had or has, or claimed or claims to have, in the said property is subject to the claims of the complainants and the intervenor herein as heirs at law of Ferdinand Fensky, deceased, and of Jeanette Fensky, deceased.

53. In not decreeing that until about July or August, 1912, neither of the complainants nor the intervenor herein, nor Charles Fensky, the father of the said intervenor, had any notice or knowledge or suspicion of the truth respecting the amount, extent and value of the estate of Ferdinand Fensky, deceased, or of the frauds or fraudulent conduct of and fraudulent misstatements concerning the same made by M. T. Campbell and Jeanette Fensky and J. H. Merriam.

54. In not decreeing that until about July or August, 1912, neither of the complainants nor the intervenor nor Charles Fensky, the father of the said intervenor, had any notice or knowledge or suspicion of the truth respecting the undelivered deeds made by Jeanette Fensky in her lifetime to the defendants Wellke, Farnsworth, Katzung and Schmidt, or any notice or knowledge or suspicion of the fact that the deeds

signed by the said Jeanette Fensky on or about the 18th day of September, 1907, were made without consideration, or that the same were not delivered to the respective grantees named therein prior to the death of the said Jeanette Fensky.

55. In not decreeing that during the month of July, 1912, one of the daughters of the complainant, Louisa Pickens, while visiting in Los Angeles, California, accidentally secured access to the correspondence between M. T. Campbell and the said Jeanette Fensky, which disclosed a part of the truth relative to the estate of Ferdinand Fensky, deceased, and the dealings of the said Campbell and of the said Jeanette Fensky in reference thereto.

56. In not decreeing that the deeds signed by Jeanette Fensky on or about September 18, 1907, were recorded a few days after her death, but were made and acknowledged several months before she died, and that until early in the year 1913, neither of the complainants nor the intervenor nor Charles Fensky, the father of the said intervenor, had any notice or knowledge that the said deeds were not delivered to the respective grantees during the lifetime of Jeanette Fensky.

57. In not decreeing that during the pendency of the proceedings in the Probate Court of Shawnee county, Kansas, and during the pendency of the proceedings in the Superior Court of the state of California, in and for the county of Los Angeles, involving the administration of the estate of Ferdinand

Fensky, deceased, and the administration of the estate of Jeanette Fensky, deceased, none of the records or papers filed in either of the said estates disclosed the truth concerning the extent and value of the estate of Ferdinand Fensky, deceased, or the facts relating to the estate of Jeanette Fensky, deceased, that were secured by the discovery by the complainants of the correspondence between M. T. Campbell and the said Jeanette Fensky, and since the said discovery, and that the said facts aroused the suspicions of the complainants and caused them to use, and prior to the filing of the bill of complaint herein they did use, extraordinary efforts to learn the facts concerning the estate of the said Ferdinand Fensky, deceased, and concerning the estate of Jeanette Fensky, deceased, and the extent and value of each of the said estates.

58. In not decreeing that each of the complainants, and Charles Fensky, the father of the intervenor herein, believed the statements contained in the inventories filed in the respective estates of Ferdinand Fensky, deceased, and Jeanette Fensky, deceased, in the Probate Court of Shawnee county, Kansas, and in the Superior Court of the state of California, in and for the county of Los Angeles, and believed the representations made to them by Jeanette Fensky and M. T. Campbell and by the defendant Merriam, and that except for such representations, the said complainants and the said Charles Fensky would not have released the estate of Ferdinand Fensky from their just claims and would not have made any assignment or quitclaim

of any interest therein, but that the said complainants and the said Charles Fensky would have enforced their respective claims against the said estate of Ferdinand Fensky, deceased, and against the estate of Jeanette Fensky, deceased.

59. In not decreeing that subsequently to the recording of the deeds signed by Jeanette Fensky on or about the 18th day of September, 1907, to the defendants herein, the defendant Eugene Wellke conveyed to persons other than the defendants in this action the real property described as follows:

Lot 6 in block A, New Fair Oaks Avenue Tract, Pasadena, California;

That portion of lot "O" of the San Pasqual Tract in Pasadena, California, described as follows: Beginning at a point in the east line of lot four, distant one hundred thirty-two feet south from the northeast corner thereof; thence west parallel with the north line of said lot two hundred feet to the east line of Magnolia avenue one hundred feet; thence east parallel with the north line of said lot two hundred feet to the east line thereof; thence along the last mentioned line one hundred feet to the place of beginning;

The portion of lot 21 of A. F. Mill's subdivision of the north half of lot 6 of the Berry & Elliott Tract, in Pasadena, California, beginning at the northwest corner of said lot; thence east along the south side of Colorado street 25 feet; thence south one hundred thirty-two and seventy-five hundredths feet to an alley; thence west 25 feet; thence north one hundred

and thirty-two and seventy-five hundredths feet to the place of beginning, except a strip twelve and seventy-five hundredths feet wide off the north side, now a part of Colorado street;

Lot 24 of Mary H. Newton Tract, in Pasadena, California,

and with the proceeds thereof purchased property known as No. 146 South Pasadena avenue, and further described as lot 60 of Baker's subdivision, and also purchased property known as No. 726 Manzanito avenue, in the city of Pasadena, and that the said Eugene Wellke is still the owner of the said two pieces of real property last mentioned.

60. In not decreeing that with the money derived by Jeanette Fensky from the estate of Ferdinand Fensky, deceased, she purchased, and at the time of her death was the owner of the following described real estate in the county of San Bernardino, California, to-wit: The east half of the farm lot 181 of subdivision of lands belonging to Semi-Tropic Land and Water Company, as per map recorded in book 6 of maps, page 12, records of San Bernardino county; that on or about September 18th, 1907, the said Jeanette Fensky, without any consideration therefor, signed a deed purporting to convey to the defendant Alma J. Schmidt the aforesaid real property; that the said deed was made without any consideration whatsoever and that the same was not delivered to the grantee therein named prior to the death of the said Jeanette Fensky; that the said Jeanette Fensky was the owner of the

said real property at the time of her death and that the same was distributable among the heirs at law of Ferdinand Fensky; that the said facts were well known to the defendant J. H. Merriam at the time he filed his inventory in the estate of Jeanette Fensky, deceased, and that the said Merriam omitted the said property from his inventory and accounts as administrator of the said estate of the said Jeanette Fensky, deceased.

61. In decreeing that the controversy involved in this action depended upon the question whether or not M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was actuated by a fraudulent purpose and intent when he conducted the probate proceedings in the said estate in Kansas and made his returns as administrator thereof.

62. In decreeing that in all that Campbell had to do in the matter of purchasing the respective interests of the heirs at law of Ferdinand Fensky, deceased, the said Campbell was acting as the agent of Jeanette Fensky and was entitled to deal at arm's length with the said heirs at law whose interests he was seeking to purchase for the said Jeanette Fensky.

63. In not decreeing that M. T. Campbell, while acting as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, had no right or authority to act as the personal agent or representative of any one of the heirs of the said decedent, adversely to, or as against the interest of any other heir of the said decedent.

64. In decreeing that when M. T. Campbell dealt in his fiduciary capacity, he was at all times, or at any time, actuated by honest and *bona fide* motives.

65. In decreeing that the contracts for the sale of real estate entered into by Ferdinand Fensky in his lifetime did not serve to operate as an equitable conversion of the titles to the respective properties so contracted to be conveyed, and that the said contracts did not serve, in any way, to convey the legal or equitable title to the real property therein described.

66. In decreeing that any decision of the Supreme Court of Kansas having reference to the equitable conversion of real property into personal property by the execution of a contract of sale of real estate was controlling and binding upon the Federal Court.

67. In decreeing that the Kansas Supreme Court has ruled, by consistent ruling, or otherwise, that where real property is sold under contract of sale, and notes for the purchase price are not given, and where time, either expressly or impliedly, is made of the essence of the contract, and where the right is given to the vendor, upon a default on the part of the vendee, immediately to declare a forfeiture and retake possession of the property agreed to be conveyed, there is no conveyance or equitable conversion of the legal title.

68. In decreeing that by the decrees of the Probate Courts in Kansas and in California and in the proceedings had in the estate of Ferdinand Fensky, deceased, in the said states, the widow, Jeanette Fensky, became

possessed of the right to the enjoyment of the estate of the said Ferdinand Fensky, in any manner other than as provided by the laws of the said respective states.

69. In decreeing that Jeanette Fensky, at any time, or for any reason, became or was entitled, equitably, or otherwise, to any interest in the estate of Ferdinand Fensky, deceased, or to any interest in any property owned by the said Ferdinand Fensky at the time of his death except as provided by law.

70. In not decreeing that M. T. Campbell, while acting as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was the trustee of all the heirs at law of the said Ferdinand Fensky, deceased, and was acting in a fiduciary capacity.

71. In not decreeing that Jeanette Fensky, while acting as administratrix of the estate of Ferdinand Fensky, deceased, in California, was the trustee of all the heirs at law of the said Ferdinand Fensky, deceased, and was acting in a fiduciary capacity.

72. In not decreeing that the defendant J. H. Merriam, while acting as administrator of the estate of Jeanette Fensky, deceased, in California, was the trustee of all the heirs at law of the said Jeanette Fensky, deceased, and was acting in a fiduciary capacity as to all persons having any interest in or claim upon or against the property of the said Jeanette Fensky or of Ferdinand Fensky, the deceased husband of the said Jeanette Fensky.

73. In not decreeing that the defendant J. H. Merriam should be held to account, as administrator of the estate of Jeanette Fensky, deceased, for the property of the said estate which came into his hands or to his knowledge for which no account has been rendered.

74. In decreeing that the settlement of the account of M. T. Campbell, as administrator of the estate of Ferdinand Fensky, deceased, in Kansas, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

75. In decreeing that the settlement of the account of Jeanette Fensky, as administratrix of the estate of Ferdinand Fensky, deceased, in California, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

76. In decreeing that the settlement of the account of J. H. Merriam, as administrator of the estate of Jeanette Fensky, deceased, in California, was conclusive as to the complainants and the intervenor as to property omitted or withheld from the account, either fraudulently or accidentally.

77. In not decreeing that the releases and quitclaims executed by the complainants and by Charles Fensky, the father of the intervenor, were fraudulent and void and of no effect, and that the same did not estop the said complainants or the said Charles Fensky

or the said intervenor from claiming their respective shares of the estate of Ferdinand Fensky, deceased.

78. In decreeing that the complainants and the intervenor are bound or concluded by the decrees of distribution in the estate of Ferdinand Fensky, deceased, or by either of them.

79. In decreeing that the complainants and the intervenor are bound or concluded by the decrees of distribution in the estate of Jeanette Fensky, deceased, or by either of them.

80. In decreeing that the decree of distribution in the estate of Jeanette Fensky, deceased, was or is valid.

81. In decreeing that due and legal notice was given of the hearing of the petition for distribution in the estate of Jeanette Fensky, deceased.

82. In decreeing that due and legal notice was given of the hearing of the supplemental petition for distribution in the estate of Jeanette Fensky, deceased.

83. In admitting in evidence the judgment roll in the case entitled Pickens v. Campbell, in the District Court of Shawnee county, Kansas.

84. In decreeing that the complainants are bound or concluded in this action by the judgment rendered and entered in the case entitled Pickens v. Campbell, in the District Court of Shawnee county, Kansas.

85. In decreeing that the Federal Court is bound or concluded by the decision of the Supreme Court of Kansas in the case entitled Pickens v. Campbell.

86. In decreeing that the complainants are bound or concluded in this action by the decision of the Supreme Court of Kansas in the case entitled Pickens v. Campbell.

87. In ordering a decree dismissing the bill of complaint.

88. In entering the final decree of dismissal April 15, 1920.

I.

The Decision on the Former Appeal (242 Fed. 363) is the Law of the Case.

This is the second appeal to this court in this action. The former appeal was from the order and decree of the District Court dismissing the bill.

Pickens v. Merriam, 242 Fed. 363.

This court in the former appeal decided certain of the questions involved in the cause, and to that extent the principles of law which shall govern the case have been determined.

Ex parte Sibbald v. U. S., 37 U. S. (12 Pet.) 488, 491, 9 L. Ed. 1167;

Washington Bridge Co. v. Stewart, 44 U. S. (3 How.) 413, 424, 11 L. Ed. 658;

National Bank of Commerce v. U. S., 224 Fed. 679, 140 C. C. A. 219;

Coal & Iron Ry. Co. v. Reherd, 226 Fed. 441, 141 C. C, A. 271.

On the former appeal (242 Fed. 363) this court held:

(1) That a change of condition in the property or in the relations of the parties thereto will not be presumed; that prejudice will not be presumed from the lapse of time; that a marked increase in the value of property will not be presumed; that these are matters of defense and must be established by proof upon the trial.

(2) That where by reason of the conduct of the appellees in this action, or of their predecessors, in concealing the facts concerning the estate, there was in fact no adversary trial or decision upon the issues involved in the cause, this action was not barred by the decree of the Probate Court settling the final account of the administrator.

(3) That the decree of the Probate Court settling the account of the administrator is not conclusive as to property accidentally or fraudulently withheld from the account.

(4) That if property be omitted from the administrator's account by mistake and be subsequently discovered, a court of equity may exercise its jurisdiction and take such action as justice to the heirs of the decedent may require, and this is so even though the Probate Court might open its decree and administer upon the omitted property.

(5) That a fraudulent concealment or disposition of property is always a ground for the interposition of equity.

(6) That the bill of complaint stated a cause of action, including a cause of action against the defendant, Merriam, for an accounting for the property of the estate of Jeanette Fensky.

The effect of the formed decision was to determine that if the allegations contained in the bill of complaint were established by the complainants, they were entitled to a decree as prayed.

In subsequent portions of this brief it will be shown that the allegations contained in the bill of complaint have been conclusively proven by uncontradicted evidence, and that the evidence fully sustains the contention of the appellants upon the points discussed by this court upon the former appeal, as well as upon others which were not raised upon that appeal.

II.

On an Appeal in an Equity Case the Appellate Court will Consider and Review both the Law and the Facts.

This court is not bound by the decree of the District Court. The case being one in equity, this court will decide the same upon its merits.

Ridings v. Johnson, 128 U. S. 212;
Johnson v. Harmon, 94 U. S. 371, 378.

On an appeal in an equity case the facts, as well as the law, are open to the Appellate Court for consideration, and the issues, both of law and of fact, must be disposed of upon the record.

Alexander v. Redmond, 180 Fed. 92.

Where a case is before the Appellate Court, not upon exceptions to the master's findings, but upon appeal from the judgment of the court below, after a hearing on the merits, the Appellate Court is in no wise hampered by the master's findings and conclusions, but the whole case is before the court for determination.

Ridings v. Johnson, 128 U. S. 212, 218, 32 L. Ed. 401;

Elliott v. Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200;

Mt. Vernon Refrigerating Co. v. Wolf Co., 188 Fed. 168, 110 C. C. A. 200.

An appeal in a suit in equity in the federal courts invokes a trial of the case *de novo,* and it is the duty of the Appellate Court to decide the issues as presented by the evidence in the record.

Alexander v. Redmond, 180 Fed. 92;

Anderson v. Hultberg, 247 Fed. 273, 279;

Waterloo Mining Co. v. Doe, 82 Fed. 45, 27 C. C. A. 50;

Beach Mod. Eq. Prac., Sec. 978.

On appeal in an equity case the facts, as well as the law, are open for consideration. The finding of the trial court, while entitled to high consideration, will be reversed if the same is against the weight of the evidence.

Bush v. Branson, 248 Fed. 377, 160 C. C. A. 387.

It follows from the foregoing citations that this court will examine fully and carefully the evidence for the purpose of determining the soundness and correctness of the decision of the court below upon the facts as well as the law, and will, by appropriate orders, direct the entry of such a decree herein as is justified by the record.

The Quit Claims from Complainants to Jeanette Fensky of their Interest in the Estate of Ferdinand Fensky, were Obtained by Concealment of Property and Wilful Misrepresentations made by Jeanette Fensky, the Administratrix and Campbell.

Ferdinand Fensky died intestate in the county of Los Angeles, state of California, on August 7th, 1903 [Tr. p. 292], leaving surviving him as heirs-at-law the complainants Louisa Pickens and Johanna Schutt, sisters of the said intestate, and besides the complainants he left other heirs-at-law as follows: Jeanette Fensky, his widow (since deceased); Frederick Fensky, a brother; Ida Wendt, a sister (since deceased); Hulda Richter, a sister; Augusta Krauss, a sister; Charles Fensky, a brother (since deceased), the father of the intervenor Charles F. Fensky; and George Fensky, a son of a brother who died during the lifetime of said intestate; the said Ida Wendt died intestate subsequent to the death of Ferdinand Fensky, leaving a son, Conrad Wendt, and some years prior to the bringing of this suit, the said Conrad Wendt died unmarried,

intestate and without issue or direct heirs, and each of the complainants succeed to one-seventh of the interest of the said Ida Wendt in the estate of the said Ferdinand Fensky. [Tr. pp. 638, 266-267, 320.] Ferdinand Fensky never had any children. [Tr. pp. 598, 291.]

In October, 1903, Jeanette Fensky was appointed by the Superior Court of the county of Los Angeles, state of California, administratrix of the estate of Ferdinand Fensky [Tr. p. 631], and one M. T. Campbell, the agent and representative of the said Jeanette Fensky, was, on October 26th, 1903, appointed administrator of the estate of the said Ferdinand Fensky by the Probate Court at Shawnee county, Kansas. [Tr. pp. 292-293.]

In the circumstances hereinafter detailed, and as a result of fraudulent statements and concealments by the administrators, the appellants, and the other heirs-at-law of Ferdinand Fensky, by means of quitclaim deeds, conveyed to Jeanette Fensky, the California administratrix, their respective interests in the estate of Ferdinand Fensky. [Tr. pp. 581-585.]

By way of introduction on this subject:

An Administrator Is a Trustee For the Heirs.

Since this proposition, which we deem fundamental, appears to have been disregarded by the administrators and rejected by the trial court, we quote a few authorities as follows:

"An executor or administrator is, in equity, a trustee for the next in kin, legatees and creditors." (Michoud v. Giroud, 45 U. S. 503, 557.)

"Representative Capacity. The executor or administrator is not only the personal representative of the decedent, but is also to a very great extent the representative of the creditors, and of the heirs or legatees." (18 Cyc. 206.)

"She (the administratrix) could claim only in a representative capacity, first, in the right of the intestate, and, second, as trustee for creditors and distributees." (Carroll v. U. S., 80 U. S. 151, 153.)

"Executors and administrators also come under the general designation of parties holding fiduciary relations to others, and legatees may of course rely upon representations made by the administrators in regard to the estate." (Bigelow on Fraud, p. 517.)

"Letters of administration are a trust." (Forsyth v. Woods, U. S. (11 Wall. 484, 487.)

"An administrator sustains to the estate, the heirs and other persons interested the relation of trustee."

Magraw v. McGlynn, 26 Cal. 421;

2 Schouler on Wills, Exrs. & Admrs., Sec. 1242.

Jeanette Fensky was administratrix of the estate of Ferdinand Fensky in California, and as such she became a trustee for the heirs and could not lawfully acquire their interests in his estate by any dealings at arm's length.

Full Disclosure and Utmost Good Faith and Adequate Consideration Are Absolutely Required to Be Affirmatively Shown by One Holding a Fiduciary Relation as Trustee, in Order to Sustain a Transaction by Him Whereby He Has Secured Property to Himself From His Cestui Que Trust.

If not so shown, affirmatively, the transaction must be considered conclusively fraudulent and void at the suit of the *cestui que trust* seeking relief from the transaction.

The general rule applicable to the transaction in securing the releases from the appellants of their interest in the estate of Ferdinand Fensky is stated as follows:

> "Where a relation of trust and confidence exists between the parties it is the duty of the party in whom the confidence is reposed to make *full disclosure of all material facts within his knowledge relating to the transaction in question,* and *any concealment of material facts by him is fraud.*" (12 Rul. Cas. Law 311.)

> "Nothing is more elementary than the *right* of the *cestui que trust* to *know,* and the corresponding *duty* of the trustee to *disclose* what has been done in the execution of the trust." (Valentine v. Harbeck, 6 N. Y. Supp. 572.)

> "The most comprehensive class of cases in which equitable relief is sought on the ground of concealment is in the case of transactions between persons standing in a fiduciary relation to each

other. In all such cases the party who fills the position of active confidence is under an equitable obligation to disclose to the party towards whom he stands in such relation every material fact which he himself knows calculated to influence his conduct on entering into the transaction. The suppression of any material fact renders the transaction impeachable in equity." (Kerr on Fraud and Mistake, p. 105.)

It sometimes occurs, as in the case at bar, that a trustee seeks to obtain an advantage over the *cestui que trust* by constituting, as here, another trustee her agent, thereby securing the benefit of that trustee's influence over the person with whom he sustains confidential relations. And their acts of concealment constituted legal fraud. Of the general relief which will be granted in cases of fraud it is said:

"Courts of equity will not only interfere in cases of fraud to set aside acts done, but they will also, if acts have by fraud been prevented from being done by the parties, interfere and treat the case exactly as if the acts had been done." (Story's Eq. Jur., Sec. 187.)

The same principle is emphatically decided with reference to persons holding fiduciary relations where concealment was practiced, in the very recent case decided in this month of January, 1921, in the case of

Steiglitz v. Settle, 33 Cal. App. Dec. 110;
Cox v. Delmas, 99 Cal. 123;
Felton v. Breton, 92 Cal. 469.

In the case of *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571, the opinion therein is so exhaustive and full of sound reasoning upon this subject, that we reprint herewith an excerpt from that case. The facts in this case which evoked this decision are very similar to those in the case at bar, and for that reason we earnestly invite the court's perusal of that decision. In part the court says:

> "No rule is better established than that, if a trustee, or person standing in the relations of trust and confidence to another, deal with the *cestui que* trust, or such other, in respect to the subject of such trust, for his own benefit, or that of others whom he represents, serving two persons at the same time in form, when in contemplation of law he can serve but one loyally, the transaction cannot be upheld if called in question by the *cestui que* trust, unless the trustee is able to prove to the satisfaction of the court, by clear and satisfactory evidence, that the two were at arm's length in the transaction, that no confidence was reposed in him by the beneficiary, that the bargain was profitable to the beneficiary, and that he was fully informed in regard to the value of the property and the nature of his interest in it." (Citing Mills v. Mills, 63 Fed. 511, and other cases.)

Continuing, the court says:

> "The burden of proof in such a case rests upon the trustee to clearly free himself from the imputation of fraud arising from the facts." Quoting from 2 Pomeroy Eq. Jur., Sec. 598, as follows: "The trustee must show by unimpeachable and

convincing evidence that the beneficiary, being *sui juris,* had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the *price was fair and adequate,* and that he made to the beneficiary a *perfectly honest and complete disclosure* of all the knowledge and information concerning the property possessed by himself, or which he might with reasonable diligence have possessed."

Continuing, the court says:

"From the fact that the transaction in question was pecuniarily injurious to the appellant, and the circumstance of the existence of either of the relations mentioned, a presumption of fraud arises which must prevail, even if only the first relation mentioned existed, in the absence of evidence showing affirmatively that appellant dealt with a full understanding and appreciation of her rights, and must prevail at her election in *any event, since the relation of trustee and cestui que trust existed.*"

"Intentional concealment is legal fraud." (Bean v. Macomber, 33 Mich. 127.)

"It is the duty of trustees in transactions with their *cestui que trust*, such as gifts, sales, contracts, or the like, to see that the latter are properly advised in regard to their rights; and the burden of proof rests upon the trustee to show such fact and the perfect fairness, openness and reasonableness of the transaction." (1 Bigelow on Fraud, 138.)

A trustee cannot purchase the interests of the others unless he makes a full and fair disclosure of all the facts, and enables them to deal with him on terms of perfect equality.

(Cook v. Sherman, 20. Fed. 167.)

Section 2235 of the Civil Code reads:

> "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are *presumed* to be entered into by the latter without sufficient consideration, and under undue influence."

The honorable trial court from which this appeal was taken has unfortunately, notwithstanding the above settled principles, in its decision distinctly declared, that a trustee is not bound by those principles, but that on the contrary, he may, lawfully (as was done in this case), deal at arm's length with his *cestui que trust* [Tr. p. 195], and in doing so also conceal from them the property of his trust and all knowledge thereof, and in addition thereto wilfully misrepresent to them the true condition of the estate, for the purpose of obtaining for the *benefit of the trustee* their interests in the estate, and even without consideration, except by use of funds belonging to the estate to which complainants were justly entitled.

In *Wingerter v. Wingerter,* 71 Cal. 105, it is held that where dealings are had between parties standing in

fiduciary relations, "not only is the utmost good faith upon the part of the fiduciary required, but the burden of proof devolves upon him to show that such faith was observed, and also that the beneficiary was fully informed of his rights, and not misled even by unintentional misrepresentations."

Equity will look with careful scrutiny upon all transactions between trustee and beneficiary, and if it appears that the trustee has taken any advantage of the beneficiary the transaction will not be upheld.

Adams v. Cowen, 177 U. S. 471, 484, 44 L. Ed. 851, 856;

Taylor v. Taylor, 49 U. S. (8 How.) 183, 12 L. Ed. 1040;

Ludington v. Patton, 111 Wis. 208, 86 N. W. 571;

Latham v. Barney, 14 Fed. 433, 441;

Michoud v. Giroud, 45 U. S. (4 How.) 503, 11 L. Ed. 1076;

Griffith v. Godey, 113 U. S. 89, 28 L. Ed. 934;

Golson v. Dunlap, 73 Cal. 157.

Wheeler v. Smith, 50 U. S. (9 How.) 55, 13 L. Ed. 44.

To the same effect:

In re Biel, L. R. 16 Eq. 577;

Luff v. Lord, 34 Beav. 220;

Reeder v. Meredith, 78 Ark. 111, 115 Am. St. Rep. 22;

Beard v. Campbell, 2 A. K. Marsh. 125, 12 Am. Dec. 362.

In 1 Perry on Trusts, Sec. 195:

"The trustee is in such a position of confidence and influence over the *cestui que trust,* that the contract or bargain will either be void or he will be a constructive trustee, at the election of the *cestui que trust,* unless the trustee can show that the contract was entirely fair and advantageous to the *cestui que trust.* The presumption is against the transaction. * * * the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent *per se.*"

In 1 *Bigelow on Fraud,* pp. 261, 262, the author says:

"When a party, complaining of a particular transaction, such as a gift, sale or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, *the law raises a suspicion* or, it is often said, *a presumption of fraud;* a suspicion or presumption, *arising as matter of law, that the transaction brought to the notice of the court was effected through fraud,* or, what comes to much the same thing, undue influence by the opposite party, by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, *requires the party in the superior situation to show that his action has been honest and honorable.*"

In *Rubidoex v. Parks,* 48 Cal. 215, 219, it is said:

> "The question, in all such cases, does not turn upon the point whether there is any intention to cheat or not, but upon the *obligation, from the fiduciary relation of the parties, to make a frank and full disclosure.* (1 Story's Eq., Sec. 316a.) In such cases, 'the law presumes the existence of that superiority and influence on the one part, and that confidence and dependence on the other, which is the natural result of the relation, and will accordingly decree the cancellation of the contract, unless it appear affirmatively to have been equal and just."

In the case at bar, no attempt was made to show any such affirmative matter, and accordingly there has arisen, of course, the conclusive presumption of fraudulent procurement and consequently it entitles complainants to the relief that it is void. Moreover, the complainants not even resting upon that conclusive fraudulent presumption, have, in addition to it, proven a case against the trustee of designedly, fraudulent concealment of property and wilful misrepresentations as to facts respecting it, which cannot be adequately phrased short of unqualified intentional deception and fraud committed by this trustee in the premises.

Jeanette Fensky, the California Administratrix of the Estate of Ferdinand Fensky, Committed a Fraud Upon the Appellants.

Fraud is accomplished by means of secrecy, circumvention and concealment as well as by spoken words.

None of these means of attaining the desired end were omitted by Jeanette Fensky in dealing with the appellants and the other heirs.

It has been said that fraud is a generic term. It embraces all of the multifarious means devised by human ingenuity that are resorted to by one person to obtain advantage over another.

Let us see the failure in this case to observe the *simplest principles* laid down for the guidance of those acting in a *fiduciary capacity*.

In Burch v. Smith, 15 Texas, 219, the court said:

> "Wherever there is a special relation of confidence between the parties, the *duty* to communicate all facts of interest to the party whose situation prevents him from possessing full knowledge of the facts necessary to intelligent action is imperative. *Any concealment in such a case will be fatal.*"

We contend that whenever a relation of trust or confidence exists between the parties, as between *trustee* and *cestui que trust,* or between one occupying any other position of special trust and confidence and the one relying upon such relations, where the *duty of full and complete disclosure exists,* any *act of concealment* by the one upon which such *duty rests, tending to influence the conduct of the other,* constitutes a *breach of trust* and brands the *whole transaction as an actual fraud.*

It is said in Perry on Trusts, section 178:

> "It is not enough that they do not affirmatively misrepresent. *They must not conceal.* They must speak and speak fully to every material fact known to them, or the contract will not be allowed to stand." (Cases cited in note 4.)

It was so held in:

> Brooks v. Martin, 69 V. S. (2 Wall) 70, 84.

In Pomeroy's Eq. Jur. (4th Ed.), Sec. 873, it is said:

> "Fraud in equity includes all wilful or intentional acts, omissions and concealments, which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another."

It was the purpose of Jeanette Fensky, the administratrix, to conceal from Mr. Fensky's heirs as much of the estate as possible, and to obtain their respective interests in the estate without adequate consideration. A part of the fraud in this connection is shown by letters that were written while the probate proceedings were pending. The letters are many and are of considerable length, and we respectfully invite the attention of the court to the full letter, although we have adverted to and quote herein from some of the more pertinent portions thereof.

Ferdinand Fensky died in Los Angeles county, California, where he was domiciled, on the 7th day of August, 1903 [Tr. p. 292], leaving an estate in California and in Kansas [Tr. pp. 293-309, 506, 507, 320-327, 261, 604, 605, 455, 524-529, 252, 258] of value of about $80,000.00, exclusive of interest. See

also Campbell's accounts [Tr. pp. 461-502] showing large sums of money sent to Jeanette Fensky after the death of Ferdinand Fensky, and unaccounted for in his estate.

Within five years subsequent to the death of Ferdinand Fensky in 1903, there had been collected from properties and assets in Kansas, belonging to him as his separate estate, at the time of his death more than $85,000.00. This was the proceeds of the evidences of indebtedness due F. Fensky at the time of his death and sent there for collection by the administratrix and returned to her prior to her death in July, 1908, in the form of cash, secured notes and mortgages. [Tr. pp. 461-502, 445, 308, 262.]

Jeanette Fensky was appointed administratrix of the estate of Ferdinand Fensky [Tr. p. 631] and upon his death she came into the possession of monies, promissory notes, mortgages and all evidences of indebtedness due to the said Ferdinand Fensky [Tr. pp. 329, 334, 252, 258] and in pursuance of the scheme to defraud the complainants and the other heirs at law of Ferdinand Fensky entered into a fraudulent and collusive agreement, with one M. T. Campbell, that he should act as her agent and representative in obtaining releases from them without adequate consideration. And in furtherance of said agreement procured the said Campbell to be and he was appointed as so-called administrator in Kansas.

Mr. Goodrich, Jeanette Fensky's attorney in California, wrote to Campbell under date of September

4th, 1903, stating that Jeanette Fensky had requested him to write him and that "Mrs. Fensky has employed me to act as her attorney in the settlement of the estate, and, having a great deal of confidence in you, she wishes you to act as the administrator of the estate, to settle up and probate the property which is in the state of Kansas. An administrator has to be appointed here also. Now Mrs. Fensky wishes to have *you act for her* in adjusting all matters pertaining to the estate in Kansas." [Tr. p. 328.] Mr. Goodrich also told Campbell that Mr. Fensky's next of kin were brothers and sisters and the children of deceased brothers and sisters, "the names of these you can get from his relatives there at Topeka." [Tr. p. 329.] also that "Mrs. Fensky will send on all of the papers which pertain to any and all property in Kansas." [Tr. p. 329.]

It will be noted that upon a full reading of the above letter of Goodrich's [Tr. pp. 328-329] he said, "Now Mrs. Fensky wishes to have you *act for her* in adjusting *all matters pertaining to the estate* in Kansas," and *also* wished him to "act as administrator" of the estate in Kansas. This letter also contained the observation that because "the laws in Kansas are more liberal with the widow than the laws of California," she wished to have all his property located in Kansas distributed "under the laws of your state." [Tr. p. 328.]

Immediately upon receipt of the foregoing, on Sept. 8, Campbell wrote *accepting* the *employment* and ex-

pressing deep regret that Mrs. Fensky could not hold the entire estate and saying that "of course all his real estate here will go to her," but that he supposed "all his personal property" would "descend under the law of California." He also made mention of the many *mortgages* and *land contracts* belonging to Fensky.

In the same letter he said:

"Give me your views of Mrs. Fensky's relation to the land and lot contracts for deeds. If she is now the sole owner of the lands and I think (without investigating the question) that she is, ought she not either to make *new contracts in her own name or give deed and take back mortgages for balance of purchase money?*"

In the same letter of September 8th, Campbell said:

"Is it at all probable that the brothers and sisters will make any claim to the contracts for deeds for property here? As soon as I am appointed administrator, I will be besieged and I want to know *your* views on some of these *important questions* before expressing *my* opinion. *I am quite willing to act for Mrs. Fensky* and will try to treat her fairly in my charges." [Tr. pp. 330-332.]

On Sept. 9th a petition for his appointment, sworn to by J. W. McClure, an entire stranger to the Fensky estate, was filed in the Probate Court. This petition stated that Jeanette Fensky, a resident of California, was the *only heir* of Ferdinand Fensky, deceased. [Tr. p. 291.] No mention was made of his next of kin, referred to in Goodrich's letter of a few days before,

and he later boasted to the *California administratrix* of what he had done. [Tr. pp. 339, 375, 411.]

On Sept. 14th, 1903, Goodrich writing on behalf of Jeanette Fensky said:

"I am glad to learn that you will *act for Mrs. Fensky* in the settlement of her late husband's estate, * * * Mrs. Fensky *of course* wishes you to act as *her agent there, as well as to be administrator.*"

He then proceeds in this same letter to set out plans, and makes suggestions whereby Jeanette Fensky might claim all of the purchase money due on the land contracts, particularly if the contracts are *not recorded*, he suggests (having been advised that the *real estate* would descend to Mrs. Fensky) that if they are "*not recorded, prima facie,* under the law so far as the *record* is concerned she would be the real owner of the lands." He also suggests that "it may be that the deeds which were placed in escrow in the bank" will sufficiently cover the case, and turns the matter over to Campbell to manage for her. He also stated that he had advised Mrs. Fensky to get releases from the brothers and sisters. Of this he says:

"In relation to the brothers and sisters making any claim to the contracts for deeds, Mrs. F. says that she cannot tell what they will do. But so far as the personal property is concerned and also the land here I have advised her to compromise with them and get their receipts in full for what interest they may have in the estate. If you have any suggestions to make along the line of such a compromise, please do so,

and *assist us in bringing the same about.*" [Tr. pp. 332-335.]

To this Campbell replied on Sept. 18th, saying:

"I think your idea of having Mrs. Fensky buy out the other heirs is a good one. * * * I could *negotiate* all right with these here, Mrs. Krauss, Mrs. Pickens and the nephew George. *They are all good friends of mine and will believe what I tell them,* I think. [Tr. pp. 339, 340.]

He also remarked in this same letter:

"It seems to me now the *wise* thing for her to do is either to make *new* contracts for deeds in *her own name* or as I suggested in my last, * * * give *purchaser a deed and take back a mortgage for balance due.*" [Tr. p. 337.]

In this same letter is the following:

"Going back to the land and lot contracts: I am satisfied that none of them are recorded. The parties who hold duplicates are all in *possession* of the property they contracted for and there was and is no need for them to record the contract to protect *their rights. The public records therefore show F. Fensky to be the owner in fee of all the property,* and a deed from his sole heir would convey a good title. * * * I ought to have all the lot and land contracts, which as I have said before, *'we' will treat* as Mrs. Fensky's *sole property,* so that I may be in a position to deal with the other parties promptly. *I am confident none of them will put their contracts on record if I advise them not to.*" [Tr. pp. 340, 341.]

Goodrich answered Campbell on Sept. 24, 1903, in part, as follows:

"Yours of the 18th inst. is at hand. And in reply I will say that I fully agree with you in all of the matters, that you have investigated and decided upon; but in relation to the distribution of the personal property there seems to be some question arising that I wish you would investigate so far as your laws and decisions of your courts go; *our law here and the decisions of our courts* upon this matter is that all of the personal estate of the deceased, must be inventoried in the county where the deceased lived at the time of his death.

"Now the question comes up if we are compelled to place all of his personal property upon the inventory here, *would not the Probate Court here have the distribution of the personal property*, the same to be distributed under the laws of this state. Of course we cannot differ in our opinions in relation to which of the state laws the personal must be distributed under. We both say that it must be distributed under the laws of the state (I wish it was otherwise), where the party lived and died. Now the question is, can the Probate Court in your county distribute personal property under the laws of California, if not then all of the personal property, when converted into money or its equivalent will have to be sent to the administrator here so that the same can be distributed here.

"Now Mr. Campbell please look this matter up and if you find that your court there has full jurisdiction over the personal property of the estate of the deceased, let me know this fact and then it will not be proper for us to inventory the personal here. * * *

"I will send you the papers as fast as Mrs. F. can get them ready. * * * She says that she wants you as *administrator* to go to the bank and get what money there is paid in upon the contracts and send to her and she will receipt for the same, she says that she needs some money, and I do not suppose that the bank would send it to her, as it would not be proper for them or *her* to do any business of that kind outside of yourself as the agent for her or as the *administrator* of the estate. * * * I will enclose you under separate cover the *contracts for deeds*. * * * And you can also take up the deeds which are in escrow in the bank and you can make out new deeds and send them here for Mrs. F. to sign and acknowledge, * * * and in some cases where enough has not been paid on the contract to justify the taking back of a mortgage, send on a new contract for her to sign.

"You say that on the death of Mr. F. that the *lands* belonging to him at the time of his death *vested* in Mrs. F. under Kansas laws without reference to any probate proceedings; while this is true so far as the law is concerned; yet would she not have to probate the estate in order that she might have a record title to these lands, in other words, would not the court have to assign the real estate to her * * * in order that the same might go upon the records and supply the link in the chain of title, upon the records.

"We will get the notes and mortgages together and send them to you as soon as possible. * * *

"Mrs. Fensky just came into my office and says, tell Mr. Campbell that I want he should hurry up as fast as he can as she wants to close the estate as soon

as she can, she brought in the contracts for sale of real estate and there are 29 of them. They are so heavy that I guess I will send them by express." [Tr. pp. 341-345.]

Campbell replied Sept. 28, 1903:

"When I said that Mrs. Fensky could do as she pleased with the real estate here regardless of probate proceedings I did not mean that we would not go on through the Probate Court, but only that she was perfectly safe in making a deed to any property here as sole owner thereof (if any one would accept it) because we all know that Ferd left no debts that such property could ever be liable for. * * *

"I will follow instructions about money in the bank and report soon. I have no doubt they will pay it over to me on my receipt for same. I sent Mrs. Fensky a check for $100 lately on the strength of what Mrs. Coughlin told me. I will send such a receipt as I think she should sign and if it meets your approval have her sign it and return it. I hope she will take no steps in any of her business matters without consulting you.

"Time enough for *me* to have the names of the 'heirs at law' after it is determined whether or not the Stoker money must be distributed here or whether I may send it to the California administrator to be distributed.

"You say you will send the notes and mortgages soon but I hope not before you have made an inventory of them. * * * I hope she will not get impatient at the 'law's delay.' This matter cannot be *'rushed' with safety to her interests* and I fear there are many disappointments in store for her before the

'estate is closed,' * * * and will do the best *I can* to have the business move on to a *successful termination.*

"It is barely possible that the Stoker money being a part of the Kansas estate at the time of Fensky's death, may be distributed according with the Kansas laws, instead of the California laws. I must investigate this further before *'we'* definitely *determine* what course to pursue in regard to it." [Tr. pp. 349-350.]

The "money in the bank" referred to in the foregoing letter and in Campbell's subsequent letter was never accounted for in any manner in the estate of Ferdinand Fensky. [Tr. pp. 293-309, 524-529.]

Campbell being fully advised that Ferdinand Fensky had signed deeds to the holders of contracts and that the same had not been delivered before his death, wrote to Goodrich, Mrs. Fensky's attorney, in reference to the *money in the* bank and the deeds, on Oct. 6th, 1903, as follows:

"I went to the Citizens State Bank yesterday and got statement of account with Fensky, which herewith send you, and which shows a balance due Fensky of $942.82. * * * I hope also that Mrs. Fensky will keep the money on the land contracts intact, *till 'we' see whether or not the heirs are going to make any claim that those contracts are "*PERSONAL*" estate.* I am going to *use the deeds made by Ferdinand* and wife as far as possible, in order, the more effectually to *eliminate that personal property question.* The *record* will *look* all right and will 'tell nothing' about the *time* the deed was delivered. I want to take mortgages back to Mrs. Fensky in all cases where the property

is good security for balance due. * * * *I know I have had the confidence of Krauss and his sister Mrs. Pickens for many years.* * *" [Tr. p. 356.]

Campbell wrote in his diary October 28th, 1903:

"Wrote a postal to J. V. B. Goodrich, telling him I was *treating the Simms' note as belonging to Mrs. Fensky,* * * * that the add'n. people were *not taking their deeds as readily* as I would desire." [Tr. p. 455.]

Another entry in his diary is in reference to the Stein notes of $2400, owing to Ferdinand Fensky at the time of his death, and, which reads as follows:

"Rec'd contracts for deeds from Goodrich, Mrs. Fensky's attorney. Wrote Mrs. Fensky asking her if the Stein notes did not belong to her and cautioning her to call her lawyer's attention to all cases where notes had been turned over to her so that they would not be treated as part of her late husband's estate." [Tr. p. 454.]

The written memorandum referred to in the above diary entry appears in the record in the form of a postal card to Mrs. Fensky and contains this significant language:

"Did not Ferd give you the Stein notes before he died? If so, they do not belong to the estate and should not be inventoried as part of the estate. Any notes turned over to you, whether he indorsed them or not are your separate individual property, and you must be sure and call Judge Goodrich's attention to all such cases so that he will not put them in as a part of the estate. *See?*" [Tr. p. 351.]

Mrs. Fensky did "see" the point quite readily. She wrote a letter to Mr. and Mrs. Stein asking them to substitute a new note payable to her, dated *prior* to her husband's death, bearing a decreased rate of interest and to keep the transaction to themselves. [Tr. pp. 261-265.] It is interesting to follow the "Stein notes" through their history of concealment, from the date of Ferdinand Fensky's death and on down through the years into the hands of Jeanette Fensky's administrator, appellee Merriam, and the same was *disposed* of by him without accounting for it in any manner in the estate of his decedent, Jeanette Fensky. And in this connection it seems an opportune time to mention that defendant Farnsworth was at all times cognizant of the fraud and frauds that were perpetrated by Jeanette Fensky upon these appellants and their coheirs. It appears that she wrote the letters for Mrs. Fensky that passed between her and the Stein's and Campbell and others. [Tr. pp. 585.] We shall hereinafter show the fraud in connection with the concealment of assets other than the contracts.

Throughout the proceedings Campbell was constantly beset with the fear that the heirs of Mr. Fensky and the Probate Court would discover the *existence* of the contracts, knowing that in that event he could not hope to convince them that their interest in the estate was but $1000 each. On November 12th, 1903, he wrote to Mrs. Fensky:

"None of Ferd's brothers or sisters have said a word to me yet about the estate, and I am a little sur-

prised that Mrs. Pickens does not say anything to me about it. Are you making any effort to buy them out? If so, *keep me posted* so that we may not in any way *interfere with each other in any efforts in that direction.*

"The only thing that I am at all afraid of there being any trouble over is the addition contracts. I am a little afraid that the heirs may claim them as *personal property,* although I have not had a hint of anything of the kind as yet from any source, and I don't believe that the court would so hold if the question was raised, but I would feel safer if the *addition people would take the deeds that you and Fred* made and which, of course, when recorded, would appear as if the title passed all right while Fred was still living, but they don't seem to care about doing so and of course I cannot urge it. * * * However, I will do the best I can and hope there will never be any *claim made by the heirs* for that part of the property." [Tr. pp. 363-364.]

On November 20th, Mrs. Fensky the administratrix, wrote to Campbell in response to his of the 12th:

"Now regarding the addition contracts & deeds. Give me your idea as to whether it would be best for me (or my attorney) to write direct to those persons holding contracts and ask them to take deeds." [Tr. pp. 364-365.]

On November 23rd, 1903, Campbell made this entry in his diary:

"Received letter from Mrs. Fensky and wrote her card before I left my office. On the way home had a talk with Mrs. Pickens about the Fensky estate & after I came home wrote *Mrs. Fensky again a long*

letter, & set out in full my reasons for having the addition people take their deeds."

In the letter to Mrs. Fensky referred to in his diary, and which makes particular mention of his representations to appellant Louisa Pickens, and in which Campbell again expressed his fear that the contracts would become public, and sets out his plan to perpetrate a fraud upon the purchasers under these contracts in giving them *void deeds,* in order to *conceal the contracts from the heirs.* He wrote:

"I wrote you a card just before I left my office this evening and a minute after I put it in the box on my way home I met Mrs. Pickens, the first time I have seen her for two or three months. * * * I told her you had nothing else on the S. side and then *explained* to her that it would be a *good while* before all the notes and mortgages could be *collected,* and that maybe some of them *never* could be *all collected,* that in any event it would be a *good while* before any one could compel distribution without giving a good bond, etc., and that if she could get hers now in property it would perhaps be *better* for her than to wait. She wanted to know about how much there would be to distribute. I told her I had not figured the matter closely but that if *all* the notes and mortgages were collected I thot' there would be about $20,000, and that 1/2 of it would go to you and the other 1/2 to the other heirs—in short that each of the *heirs would get about $1000. Yesterday I told Krauss* about the same thing. *If we could only agree on the amount each ought to have then the wise thing to do would be to buy them out.*

"I am afraid if you write to the Add-people about the deeds that it will arouse *suspicion* that something is wrong. And should any of them go to a lawyer and ask him about those deeds he would tell them that a deed signed but not delivered nor to be delivered until after the death of the grantor was no deed at all, and that would scare half of them out of their wits. And yet I know that if they take these deeds no question will ever be raised as there will be nothing of record to show *when* they were delivered and they *would* show that they were signed (altho not *made* because the *delivery* is a part of the *making* of a deed) before F's death. *I would rather they would take these deeds now than a deed from you alone, simply because that property is not as likely to attract the attention of the 'heirs' if it looks like it was sold before* F died instead of *after* he died. I don't know that any of them will ever claim that the Addn-contracts are a part of the *personal estate and subject to the California law*, but it is too early yet to tell what they will claim. And if they do make such a claim, I think we can defeat them, but I want, if possible, to save the trouble and expense even of defeating them. I reason therefore that all the lots that will show on record as sold *before* F's death are just that much further away from the probability of attack; because no one would be foolish enough to claim that the 'heirs' had any right to a note and mortgage made to you on property that was sold by Fred himself. With this idea in view and for the sole purpose of more throughly protecting you against possible claims of the "heirs" I have picked out about a dozen of the Add-people from whom I think it would be safe for you to take a mortgage, and I have suggested to most of them that if they wanted their deed now I would

advise you to give it and take a mortgage for the balance. * * *

"I feel sure that Mr. Goodrich will agree with my view of this matter as the best way to keep the Add contracts out of any possible controversy, but it will require some tact to get the folks to take the deeds and give back the mortgages, * * * I am afraid a letter from you or Mr. Goodrich to them in regard to the deeds will arouse a discussion that might embarrass us. So let me *casually* call their attention to their own interest in the matter when they come to make their payments and in that way it will not appear as if we were too anxious. * * * *I am afraid the scheme to buy out the heirs will not work.* * * *

"But suppose the opportunity offers for me to talk about it to those here, how much shall I offer? * * * Is there any property out there that you have to divide with the 'heirs'? I only care to know so that I can speak advisedly in case any of them talk to me about the *amount* they ought to have." [Tr. pp. 366-370.]

It will be remembered that the above letter was received by the California *administratrix* and her *stamp* of *approval* put upon the *concealments.* Campbell later writes to her in answer to a letter from her, which is not in the record, in which he uses this significant language: *"I see you 'catch on' to the point in giving deeds to parties holding contracts."* [Tr. p. 384.] It will also be observed that in this letter above Campbell says, "I told her (Louisa Pickens) that each of the heirs would get about *$1000,"* and then he says, "If *we* could only agree on the *amount each ought* to have then the *wise* thing to do would be

to *buy them out.*" He had previously been commissioned by Jeanette Fensky to buy out the other heirs, and had advised her (the administratrix) that he had the full confidence of the heirs and that they would believe whatever he told them [Tr. p. 340] and the suggestion that, "if *we* can agree upon the *amount each ought* to have," that *through him she* could convince the *cestui que trusts* that *that amount* was their full share of the estate. In the subsequent letters it is declared that she has made money by the purchase of the interests of the heirs, *exclusive* of the property concealed.

The foregoing letter brought forth the following from Goodrich, November 28th, 1903:

"Mrs. Fensky called on me, and is quite anxious to obtain from the heirs-at-law quit-claims or receipts in full for their interest in her late husband's estate. * * * And in order that you may talk with the heirs who are located at Topeka, I send you herewith a statement of the inventory which has been filed here. * * *" [Tr. p. 370.]

He then sets forth in this letter a total of $3,700.00, which is subject to distribution. As *one* example of the *misrepresentations* as contained in this inventory, we call the court's attention to the *60 acres of sand and sage* land, valued at *$1400.00.* John Davis testified that he had been *farming* this land for five years prior to the time of Ferdinand Fensky's death, and had purchased from him on contract, shortly before his death, *thirty acres,* of this *sixty acres,* making a payment

at that time, and was owing *$1650.00* to Fensky at the time of his death on account of this purchase, which sum was subsequently paid to his administratrix and is unaccounted for in his estate. [Tr. p. 603.]

In this same letter Goodrich continuing, says:

"Now you know what the property is there, and, of course, the heirs cannot expect any of that property there which could, *in the least way, be recognized as real estate.* And if any of the *personal* property belonging to his estate, which is in your hands, is to be distributed under the laws of the state of California, then out of such personal property would come all of your expenses and expenses of the distribution of the estate, and then the widow has one-half of the balance of said personal property, *if any,* it seems to me that but little would remain to distribute among the heirs. *So you may talk to them on that line and see what can be done with each of them."* * * * [Tr. pp. 370-372.]

Campbell later wrote to Mrs. Fensky in reference to the above letter as follows:

"Oscar Krauss (the husband of one of the heirs) called this morning and I showed him copy of my inventory filed in court, and read him *such portions* of Judge Goodrich's letter in regard to your inventory there as *I thought proper* and he made a minute of the amounts, which aggregate something over $24,000 and is to give me his idea of my proposition to pay each $1000 soon." [Tr. p. 397.] Continuing Campbell said that if they would accept that sum, she would "*make money by it as an investment.*" [Tr. p. 398.]

On Jan. 8th, 1904, Campbell wrote in reference to the Simms note belonging to the estate, that he was treating it as her *individual* property and not the estate. [Tr. p. 374.]

Campbell wrote to Mrs. Fensky Jan. 11th, 1904, boasting that he had successfully concealed from the court the identity of the other heirs, other than herself, and cautioning against a distribution until the *"addition matters"* were in better shape. Meaning, of course, the changing of the contracts belonging to F. Fensky, into mortgages to her individually. [Tr. p. 375.]

March 30, 1904, Campbell again wrote to Mrs. Fensky concerning the holders of contracts:

"I am so anxious to have all of them that have paid enough to get their deeds *before the "probate court" takes any action to distribute the estate that I think it best to take a little risk in the matter of security for balance due on the lot."* [Tr. p. 376.]

On a torn calendar leaf he also wrote to Mrs. Fensky:

"Some of the addition people are a little slow but I am gradually getting matters in that 'neck of the woods' in the shape I want them. Have 8 mortgages now. * * * I want as many to take deeds as I think it safe to take a mortgage from before *any further steps are taken in the "Probate Court,"* but it will not do to allow them to think I am in a *hurry* about it." [Tr. p. 287.]

April 6th, 1904, the administratrix, writing to Campbell, requested information concerning the contract

holders, and the names of those that had accepted deeds, etc.

Under date of April 11, 1904, Campbell wrote that he had given deeds *to* and had taken mortgages *from* a number of the contract holders [Tr. p. 379] and on April 28, 1904, he wrote that "more of them are getting in the notion of taking deeds and when I get that phase of the business closed up, I will begin to think about taking steps to close up the estate." [Tr. p. 381.]

On May 26, 1904, Campbell wrote:

"I sent for Geo. Fensky and had another talk with him today about his interest in the estate and *explained to him that the share of each heir would probably be about $1000.* * * *

"Do you have any communication with any of the heirs? *I told Krauss once that I thought each heir would get about $1000.* * * *

"If you think it worth while to try to buy out the heirs, it ought to be done before I take any steps toward a distribution *through the court. I would like also to get some more of the addition people to take their deeds before any developments in court.* I don't fear any contest unless some of the heirs get the fool notion in their heads that the lot and land contracts are *personal* property and subject to division." [Tr. pp. 382-384.]

Mrs. Fensky apparently answered this letter, although her letter is not in the record, and on June 22, 1904, Campbell wrote as follows:

"I see you *'catch on'* to the *'point in giving deeds to parties holding contracts,* but strange to say there

are about half dozen who are so afraid of the word mortgage that they will not take their deed and I can't talk too much about it *for fear of arousing suspicion and perhaps inquiry of some 'fool lawyer.'* * * * No Mrs. Rost is not paying *rent.* She has a contract for deed just like the rest." [Tr. pp. 384-386.]

On June 23, 1904, Campbell wrote in his diary: "Had a talk this evening with Oscar Krauss in regard to the Fensky estate, and arranged for him to examine inventory of property about the middle of next month with a view of his advising the brothers and sisters of the deceased to sell their interest in the estate to Mrs. Fensky, the widow." [Tr. p. 455.]

On July 5, 1904, Campbell wrote relative to the Goff contract:

"Perhaps it would be well for you to make a new contract with him—and also with Pruessner. * * * Talk to Judge Goodrich about this & see if he does not think it would *answer about the same purpose, from the standpoint of the 'heirs,' as the giving of a deed & taking mtg.*" [Tr. p. 390.]

And in the same letter said:

"And after I settle with George think I will at least make an effort to buy out the others. *If we can't buy them out,* will take steps to have the court make distribution, *as by that time I will have deeds in the hands of most of the addition people & I think these same notes & mortgages that you would just as soon take as money on your share.*

"In regard to Mrs. Rost, if we were '*dead sure*' *that no question would ever be raised by the 'heirs' about*

these land contracts, I would say let the contract continue, but in view of the possibility of such a question being raised, and the fact that the property is worth $1500 to $2000 more than they owe you I believe I would risk taking a mortgage for am't due & giving her a deed. * * * I asked Laura if she thought it worth while for me to see her father in regard to buying his interest in the estate on a basis of about $1000 and she said she was afraid not, as he had an idea that there was much more coming to him than that." [Tr. p. 388.]

"Am glad Judge Goodrich prepared the quitclaim deed for George to sign. When I prepared my assignment I was thinking only of the personal property—which is the only kind of property belonging to the estate *in Kansas,* but in view of his interest in the real estate in California, the quitclaim deed is better." [Tr. pp. 390-391.]

On July 6, 1904, Campbell wrote to the appellant, Johanna Schutt, and accompanied the letter with a copy of the inventory appearing on [Tr. pp. 269-272.] It omits all reference to the Stein note of $2400, and the notes of Simms and Kimmerle, the monies in the banks, the contracts for the sale of real estate in California and Kansas, the real value of the California real estate and certain other items, aggregating in amount, more than $40,000. The letter is as follows:

"Under the law of California where Ferd Fensky died intestate, one-half of his real and personal property in that state goes to his widow and the other half to his brothers and sisters. The same rule applies to his personal property in this state and I have been

appointed administrator of his estate and have three years from the date of appointment in which to close up the estate. The personal property here consists of notes and mortgages and on their face amount in the aggregate, including money collected, to about $21,000. A number of the debtors want time in which to pay & if Mrs. Fensky, the widow, was to take over these notes, she could accommodate these people and still collect nearly all the money on the notes in exchange of them. If collection is forced, there will necessarily be much expense and loss attending collection. I can't be at all sure how much each of the heirs, besides the widow, will be likely to realize out of the whole estate after all expenses and losses are paid but I think somewhere in the neighborhood of $1000 and I have advised Mrs. Fensky *that if she can buy out the other heirs for $1000 or less to do so.* If you think favorably of the suggestion and will accept $1000, in full of your share of the estate let me know soon and I will prepare an assignment of your interest to Mrs. Fensky and see that you get the money without unnecessary delay. I have such an agreement with one of the heirs here (George Fensky, a nephew) and expect to settle with the others on a like basis. I believe such a settlement would be *fair* to Mrs. Fensky and under all the other *circumstances better for the other heirs,* as it would save time and much court costs." [Tr. pp. 393, 394.]

At the same time he wrote similar letters to other heirs. [Tr. pp. 398, 392-395.]

In the above letter and the letters written to the other heirs we find the proposition that if the heirs will *sell* that Mrs. Fensky will *buy.* But the purchase

was made with the estate funds. [Tr. p. 407.] We also find the suggestion of *"losses"* and much expense which he and Jeanette Fensky knew was not true, and not at all likely to occur, as is evidenced by his letter to the California administratrix, from which we quote as follows:

"All the notes can be collected except the little Stump note. The F—— note may have to be partly traded out, but all the rest *are as good as cash."* [Tr. p. 403.]

He later writes that, *"Even* the Stump note can be collected." [Tr. p. 441.]

On July 14, 1904 Campbell wrote to Jeanette Fensky, the administratrix:

"Rec'd the George deed yesterday and will close the deal with him soon.

"When I wrote Richter, I also wrote in substance the same offer to the others. * * *

"This morning stopped to see Krauss and he said Charles had referred the matter to him and that he would come to my office next Saturday and talk the matter over with the view of writing Chas. and telling him the facts as he may learn them from me. I intend to show him my inventory and Judge Goodrich's statement of the California property and I feel pretty sure from the way Krauss talks that he will advise the sale to you of each share for $1,000. If they are willing to accept that I want to be sure that it is satisfactory to you before I pay out any money. I will use the form of release and quitclaim Judge Goodrich prepared in George's case and soon close the deal after it is

agreed to. So be sure to write me soon that it is all right to pay the $1000.00 to those who see fit to accept. Will put the Wellke deed on record today. * * *" [Tr. p. 396.]

Mr. Krauss testified that in these conferences *Campbell never mentioned "contracts"* and *that he, himself, knew nothing of the contracts until this litigation.* [Tr. p. 275.] He further testified that he did not know at the time he advised his wife to accept $1000 that W. C. Stein owed the estate $2400, and which did not appear in the property statement given to him by Campbell purporting to show the full value of the estate, and did not know of the other notes and monies in the banks, which were omitted from the inventories, and had no notice or knowledge of the true value of the estate, other than as was listed in that statement. He also testified that he did not know that Campbell was acting as agent and attorney for Mrs. Fensky, and that Campbell indicated in these negotiations that if the heirs would accept $1000 each and assign their interest that it would cut the matter short instead of keeping it in the Probate Court for years, and the expenses of the court, and so forth, and that the amounts set out in the statement *"if collectable"* would be all that the heirs would share in [Tr. p. 268] and that it would expedite the matter if we accepted the $1000, as it was only a matter of time that we gained by it. [Tr. pp. 273, 266-273.]

On July 6, 1904 the following was written to the California administratrix by Campbell:

"Oscar Krauss called this morning and I showed him copy of my inventory filed in court and read him such portions of Judge Goodrich's letter in regard to *your inventory there* as *I thought proper* and he made a minute of the amounts which aggregate something over $24,000, and is to give me his idea of my proposition to pay each $1000. I showed him what I had written to the heirs and handed him my letter to Mrs. Wendt for him to send when he wrote her. I feel pretty confident that he will recommend a settlement on that basis. And from your standpoint I am sure it will *be much better for you.* You will not only *make money* by it as an *investment*, but it will avoid the possibility of any contests in Probate Court. I am only afraid some of them will not accept the offer. If they accept, the main inducement will be the early payment rather than to wait two more years as I have indicated they might have to . Krauss talked like he thought Frederick would be the hardest to settle with. But I wrote him also and guess I will hear something from him before long. Let me know what you and Judge Goodrich think of the proposition as soon as possible." [Tr. p. 397, 398.]

It appears from the following hurried note written by Campbell to the administratrix that one of the heirs (probably Frederick) had written that he would not assign his interest in the estate. He wrote:

"Just now got this. Return it some time.

"I am a little disappointed but we had better settle with all those who *will* accept the $1000 anyhow and let the others wait awhile.

"If Mrs. Krauss accepts I think we had better get assignment from her & Mrs. Pickens as *soon as we*

can. If they accept, it means that Mrs. Wendt accepts also. If the Topeka heirs are eliminated from a possible contest in court, I feel that there is less likelihood of the 'foreign' heirs making any fight. I think K's decision will also decide Charles case as Chas. wrote him about it.

"If any of the others write me will *post you immediately.*" [Tr. p. 287.]

The next letter to the administratrix appearing in the record, is dated July 25, 1904 [Tr. pp. 398-401.], and to which we ask the court's particular attention. It is an express declaration of the misrepresentations and concealments made by the trustees to obtain these releases, and is in conformity with the entire transaction from beginning to end, to-wit: To obtain from the heirs, assignments of their interest in the estate, to the administratrix for a grossly inadequate consideration or no consideration at all.

On August 13, 1904, Campbell wrote:

"K's (Krauss') *confidence* in me & his influence with the others is helping me greatly in getting settlement." [Tr. p. 401.]

It was represented to the brothers and sisters of Ferdinand Fensky, by these trustees, that the *share* of each heir would be *$1000,* if *all* the notes were collected. [Tr. pp. 366, 392-395, 382, 383.] That this representation was *false* and known by the administrators to be *false* is conclusively shown by the following excerpts from letters that passed between them, in regard to the purchase by the *administratrix* of the

share of the heirs for $1000 each. Campbell in a letter to her, dated July 16, 1904, says:

"*You will not only make money by it as an investment,* but it will avoid the possibility of any contest in the Probate Court." [Tr. p. 398.] In other words, she would make money by the purchase on *just what was inventoried* and it would avoid the possibility of bringing into the Probate Court the assets concealed by the administratrix. In another letter the administratrix is advised that if distribution is made through the court that she *certainly* would realize less money out of the estate [Tr. p. 402], and in another letter great fear is expressed lest one of the heirs compel court proceedings and have it disclosed that it might pay him a *good deal* better to take his share than to sell out for $1000. [Tr. p. 418.]

On Aug. 14, 1904, written by Campbell to the administratrix, the following appears:

"In the case of such distribution you would lack from $2000 to $4000 of getting as much out of the estate as you will if you buy out the other heirs for $8000." [Tr. p. 402.]

The *$2000 to $4000* above mentioned, to be *made* by the *administratrix* in the purchase from the *cestui que trusts,* of their interest, was the sum to be realized from the notes and mortgages contained in the Kansas inventory, *only,* and did *not* include any of the property in the *California estate,* nor any of the other *assets concealed,* which would add *many thousands of dollars* to the above sum.

In the same letter he wrote:

"I want to agree with you beforehand about my compensation, as administrator of the estate, so that I will not have to raise that question in court at all when I make my final report.

"There are many advantages to you in buying out the heirs, if it can be done, rather than have distribution made through the court where many questions of dispute might arise, and much costs be made, and with certainly less money realized out of the estate by you. * * *

"I have already got assignments from four of the heirs and fully expect to settle the same way with all the rest, but may be disappointed in Frederick. *I don't care for them to know how much money I have already collected on the notes, nor how much more I can collect soon, if necessary.* If they all sell out, then it is nobody's business but your's about the character of the estate, and if you are satisfied with what I turn over to you, that is the end of the business, without making a detailed report in the Probate Court of the amount of *cash* collected on the notes that I have inventoried.

"Let me hear from you soon, so that by the time I finish my negotiations with the heirs I will know how to frame my report, with the view of closing up the estate and getting my discharge as administrator.

"All the notes can be collected except the little Stump note. The F-note may have to be partly *traded* out, *but all the rest are as good as cash.*" [Tr. pp. 402, 403.]

He later wrote that *even the Stump note* could be collected. [Tr. p. 441.]

On August 26, 1904, he wrote:

"I wonder why Richter does not send on the assignment. Have not heard a word from him since I sent it to him through you. I told you in my last card that Frederick decided not to sell out his interest, but I have hopes of him yet if all the others sell, as I feel sure they will. * * * Keep me posted if Frederick writes you." [Tr. p. 405.]

Campbell haunted by the ghost of a possible discovery of the contracts, etc., by the court, on Sept. 2, 1904, wrote to Mrs. Fensky:

"I still *hope* that it will turn out all right, but *I hate to have inquiries made of the court* here that may stir up a discussion about the matter, especially as Frederick is still balking and Richter delays in sending any assignment for his mother. I suppose there is nothing to do but wait for developments. [Tr. p. 406.]

Then on September 5, 1904, Campbell wrote to the California administratrix as below, telling her of the illegal use he was making of the estate funds, and as will later appear, out of that *same fund* he was paid for this service *alone* (obtaining the assignments from the heirs), the extraordinary sum of $3,000.

"Of course I have used *estate* money, $5000, to buy out the five heirs who have made assignments, but remember that I am making these purchases *as your agent and supposedly* with *your* money and not as administrator of the estate. So that if I send you any estate money it is not upon the theory that I have made any distribution to the others, but upon the theory that the risk is so slight that I as administrator

can afford to take that risk. I will prepare a letter for you to address to me, as a protection to me in case of a *possibility* of any question being raised as to my right to advance you any money before being so ordered to do by the court. After I receive your request I think I will send you receipt to sign for $5000, I have already advanced you to purchase the interests of Augusta, Louisa, George, Charles and Johanna. It occurs to me just now for the first time that I had better send you such receipt in this. So sign and return it the next time you write. If you have any doubt about the correctness of my views about these matters be sure and consult Judge Goodrich before you act. I often wish I could talk to you about them face to face as we are all liable to be misunderstood when depending entirely on written communication. I feel sure tho' that you will appreciate that it is *you and your* money that is buying out the other heirs and that my connection with the transaction is not as administrator of the estate, but as your agent, just as I am acting in regard to your other individual property here." (The italicized words are underscored in the original letter.) [Tr. p. 407.]

On September 14, 1904, Mrs. Fensky wrote to Campbell:

"I wish Mr. Campbell, often times that you and I could have a heart to heart talk, but we will have to be satisfied with writing and be very patient and don't try to hurry matters too much. I do hope matters will come out satisfactorily yet." [Tr. p. 408.]

In response Campbell wrote on September 21, 1904:

"I have just this moment received your letter of 14th inst. enclosing one from Judge Goodrich, and

this will serve as an answer to both. I think the judge did not catch my idea when I wanted you to write to me to advance you $8000. You will notice I did not want you to *date* that letter. Because, as you will readily see, I wanted it to cover the $5000 I have already advanced in paying for assignments, and enough more to let you have what you needed for present purposes. * * *

"Now I want the letter without date (unless you choose to have it bear a date prior to my first advancement) and then I want your receipt for $5000 which will show that under and by virtue of your request I advanced you that much money. * * * When I get such a letter I shall feel perfectly safe in sending you as much as $3000 more of the estate money *without asking the court anything about it.* * * *

"And, by the way, *I have made no showing in this court as yet that there are any other heirs besides you;* and until it is fully demonstrated that *we* (*you*) cannot buy out the others, *I don't want to make such showing.* * * * The judge is busy trying to get elected again and I am hoping we will get assignments from the balance of the heirs before his attention is called to this estate." [Tr. p. 409-412.]

The next letter in the record written to Frederick Fensky, is a repetition of the representations made to the heirs as to the *condition* of the estate, which is false, and known by the trustees to be false. The letter is dated Oct. 7, 1904, and is in part as follows:

"She (Mrs. Fensky) did not think at first that she could give that much ($1000) to each one and take all chances of collecting the *doubtful claims* and pay all the costs and expenses of administration. And if

collection of the poor claims is attempted to be forced it is very doubtful about her getting back what she has paid the others for their shares." [Tr. p. 413.]

It will be noted that no mention is made to the *heir* that the "money paid to the others" was estate money to which they were then justly entitled. In effect, these trustees reached into the pockets of the heirs for the money which they paid to them for their own property. In this same letter he refers to "doubtful claims" [Tr. p. 413], although he wrote to Mrs. Fensky in August that the notes were *"as good as cash"* [Tr. p. 403], and he later referred to them as *"these so-called doubtful notes."* [Tr. p. 425.] In no sense were these trustees making a full and fair disclosure as the law required.

Campbell wrote to Jeanette Fensky on October 20, 1904:

"I wish I had those assignments here in case Frederick calls on me. You don't express any opinion ab't the delay of Richter. What do you think of it? Can't you frame some good excuse for writing to him and asking him without appearing too anxious? * * * If you hear anything from Richter *be sure* and let me know.

The only thing that concerns me about Frederick is that he may go into Probate Court and have me cited to make a report, and then *ask that what I have already collected be distributed, or in other words have it disclosed that it may pay him a good deal better to take his share than to sell out.* Whereas if you can become the sole owner of the whole estate before I am called upon to make a report, I can make my

report a *final* report and get an order to pay over everything in my hands to you without necessarily disclosing to the world how much I have collected on the notes. *A receipt from you for all notes and moneys in my hands would satisfy the court and entitle me to a discharge.*" [Tr. pp. 416-418.]

He subsequently gets from the *domiciliary administratrix* such a receipt and files it in the Probate Court. [Tr. pp. 307, 308.]

On January 9, 1905, Campbell wrote to the administratrix referring to his success in buying the interests of the heirs for her, he wrote:

"I think in this whole matter *I have been very fortunate in having the friendship and confidence of Mr. Krauss.*" [Tr. p. 424.]

And in the same letter, referring to his negotiations with Frederick Fensky, said:

"In case Frederick fails to write to you, suppose you talk with Judge Goodrich and let me know the very most I may offer him in case he will not settle for $1000 and still shows disposition to sell and assign his interest. *If his fool* lawyer *knew* anything he could go into our Probate Court here and have me cited to make a report which would *show* that *I collected more money on these so-called doubtful notes* than perhaps he *thinks* I have; and for *your* interest I would rather not do that if I am compelled to. If we can buy him out I will make *you* full and complete statement of all money collected, and *then when you receipt for such moneys* and for balance of *notes and mortgages in my hands* the Probate Court will discharge me as admin-

istrator because there will be nobody else in all the wide world to object to it." [Tr. p. 425.]

On January 24, 1905, Campbell transmitted to Mrs. Fensky the assignments which he had obtained from six of the heirs, and in that letter, again referring to Frederick Fensky, said:

"If Frederick sells out to you I think I will not need them here, but as yet I have heard nothing more of or from him. How would it do for you under Judge Goodrich's advice, to write him, being very careful of course not to complicate me in any way as *ad'r?* If Laura told me correctly, he thinks *I* am the one to blame and it might be well enough to let him remain under the impression that it is not to *my* (selfish) interest for him to sell out, but to have this matter hang on the full three years, but from *your* standpoint it makes a good deal of difference, since you have spent $7000 to buy the others out, to save all the costs possible in order to come out even. Tell him that the debtors are writing you to reduce interest, give more time, throw off part of debt &c &c. (I have directed some who have applied to me to write you) and that if you had his interest you could make new deals with them and perhaps get out whole, but that surely under all circumstances he would not ask you to pay him more than the $1000 that each of the others accepted. You might also mention that Ferdinand intended for you to have *all his property.* * * * If you *should* write him send me a copy of your letter." [Tr. pp. 427-428.]

The foregoing letter of Campbell's written to the administratrix is but another example of the *conspiracy to deceive* and *concocted* for the occasion.

On January 31, 1905, he wrote as follows:

"Am anxious to know what you think or have done about my suggestion that you write Frederick." [Tr. p. 428.]

On Feb. 9th, 1905 Campbell wrote:

"You say you wish Mrs. Tuttle could make a new loan and pay off her mortgage. This is not *wise* from your standpoint as long as Frederick has his interest in the estate. * * * But if it is converted into cash and he finds it out, he will be coming into court and asking for a division, and will get his $1000 without selling out at all. The unpaid paper is one of the best arguments to use to induce him to sell out for cash, and let you run all the risk of *collecting bad debts.* So don't worry about the Tuttle mortgage. It is *perfectly safe* and you will get the money on it in due time if you can only buy out Frederick's interest. * * * I will hurry matters along to a close and render you a full account of everything, if we can only get him out of the way. *I don't want him to know how much cash I have already collected for the estate* unless he compels me to disclose the fact by making me make a report to the court. *If you do not thoroughly understand the point I am trying to make please consult Judge Goodrich whom I am sure will agree with my view of the matter.* So far the court has said nothing to me about the estate since I filed my inventory, and *as long as the court lets me alone it is to your interest for me to let the court*

alone until you buy Frederick out. If, and when, you buy him out, I will soon get busy in the way of collecting the paper still unpaid." [Tr. p. 430.]

Finally resort was had to the writing of a letter to the brother, Frederick, by Mrs. Fensky, the administratrix, who first submitted a draft of same to Campbell [Tr. pp. 596, 597] who, in turn, struck out certain portions of what she had prepared and interlined in pencil what she should write in lieu thereof. Defendant Farnsworth testified that she wrote the first draft and the *corrected letter* that was mailed to Frederick, at Mrs. Fensky's directions. The first page of the instrument appears on page 597 of the transcript, and the remainder on pages 593-596, the portions appearing in capitals were suggested by Campbell and the remainder by Mrs. Fensky. The portions rejected by Campbell which appears in small capitals near the top of transcript, page 596, contained the word "contracts." This word Mr. Campbell never let appear in any communication with either of the brothers and sister, but it frequently appeared in the letters *to* and *from* the administratrix.

In transmitting the corrected draft of this letter to Mrs. Fensky, Campbell wrote to her on February 25th, 1905, as follows:

"Just now got yrs. with one you prepared for me to forward to Frederick if I approved of it. Am sorry to have to raise any objection to it, *but there is one clause about the addition property* (contract property) *that I am afraid to risk* & I therefore return the letter

for you to make some change in it. I also return his letter. Should he treat the property conveyed as of the date each deed was *signed,* then I am afraid he will claim that the balance due on each lot, & which is *now evidenced by notes & mortgages made to you,* was & is *personal* property *belonging to the estate* * * * So we want to *treat the Addn. property* just as we do the Goff, the Pruessner & the Rost properties & *just as tho' there were no contracts of sale in existence —simply treat all of it as real estate that Ferdinand died seized of* & which went to you as his sole heir at law & of course which you can do as you please with. *So I suggest that you change your statement about the Addn. property as I have indicated,* so that if he examines the records & *finds the mortgages made to you on the property* he will not be so apt to claim that they *represent a credit that was due the estate from the Addn. people at the time F died.* * * * Get your letter off to him as soon as possible with some *plausible excuse* for your delay and keep me posted." [Tr. pp. 433, 434.]

The above is the letter of which the trial court made particular mention in his opinion. [Tr. p. 197.]

Frederick finally, on March 15, 1905, "came across." This is chronicled in Campbell's diary [Tr. p. 457], as follows:

"Mar. 15, 1905. Received Frederick Fensky's assignment. * * * She has now bought out all the other heirs and in doing so, thru my instrumentality, I have spent for her $8016.10."

The next step in the transaction was a mild controversy between Mr. Campbell on one side and Mrs.

Fensky and her California attorney on the other in regard to the amount of his fees as appears from Mr. Campbell's letters appearing at pages 438, 439 and 434, of the transcript. This question having been finally adjusted, Mr. Campbell filed his petition for final discharge containing no itemized account of monies received, but in lieu thereof this statement:

"Since the appointment of this administrator said Jeanette Fensky has purchased all the right, title and interest of each of the other heirs in and to said estate and that she is now the only heir at law interested in the settlement thereof." [Tr. p. 303.]

He asked the court to order that upon filing receipt from *Jeanette Fensky for all property in his hands belonging to the estate he be discharged.* [Tr. pp. 306, 307.] Upon filing such receipt order for final discharge was entered. [Tr. p. 307, 308.]

In order to throw additional light upon the breach of duty by these trustees, we revert back to some of their declarations in reference to their acts.

The administratrix not satisfied with the concealment of assets, actively and knowingly misrepresented the value and condition of the estate even as contained in the inventories. Their letters contained such language as *"these so-called doubtful notes"* [Tr. p. 425], referring of course, to the statements made to the heirs as to the collectability of the paper, and, that, the *administratrix* was taking a *great risk* in the purchase of their interest at $1000 each, because of the *doubtful claims.* [Tr. p. 413.] In another letter Campbell,

writing to the California administratrix, expreses great *fear* lest one of the heirs who had not assigned his interest in the estate compel him to make a report in Probate Court, "and then ask that what I have already collected be distributed, or in other words *have it disclosed that it may pay him a "good deal" better to take his share than to sell out."* [Tr. p. 418.] In time their design was fully accomplished—every heir had assigned his interest to the administratrix. Campbell wrote to her on the day of procuring the last assignment, and in reference thereto, as appears in the quotation below:

"I think it is no one else's business *how much up to this time, has really been collected,* and for *your* interest I think it best not to disclose it, for the inspection of the heirs who have sold out. * * * For *one* of the inducements for them to sell out was the supposed doubtful of much of the paper and I see no good reason *for showing them that they might have fared better not to have done so."* [Tr. p. 435.]

Campbell wrote to Mrs. Fensky on Apr. 11, 1905, again advising that he had used *estate money* to *pay for the assignments of the heirs,* and that, on that account had charged $11016.10. [Tr. p. 442.] His diary and accounts [Tr. pp. 457, 474, 481] show that he paid to the heirs $8016.10, leaving a balance of $3000 for his services in securing the assignments from the *cestui que* trusts.

Campbell wrote to the administratrix relative to his charges as follows:

"I know they are not steep. *I know I have saved you money, even after my charges are paid.*" [Tr. p. 446.]

We do not know the exact amount of his charges; we do know, however, that he was paid as attorney and agent of Jeanette Fensky, as administrator and received an additional $3000 for his services in procuring the releases from the heirs, *all out of the estate of Ferdinand Fensky* [Tr. pp. 442, 444] allowed to him by the administratrix.

The foregoing excerpts from the letters show *fraudulent active concealment,* and *misrepresentations by these trustees* in obtaining the quitclaims and releases, each of the actors in the fraud benefiting by the transaction, Jeanette Fensky, in obtaining large properties without paying anything of value therefor, and Campbell benefiting by a *treble* compensation.

In the following pages we will show the manner and means used by the administrators in concealing certain notes and monies belonging to the estate.

The Concealment of Certain Notes and Monies None of Which Were Inventoried in the Estate of Ferdinand Fensky.

Mr. W. C. Stein testified that at the time of Ferdinand Fensky's death he owed said Fensky the sum of $2400 on account of two notes. [Tr. p. 261.] That he thereafter changed these notes into the name of Mrs. Fensky, at her written request, into one note of $2400. [Tr. pp. 265, 263-265], and dated said

note *prior* to the death of Ferdinand Fensky. [Tr. pp. 262, 263, 264.] $1800 of this note was paid directly to Jeanette Fensky [Tr. p. 262.] The remaining $600 owing at the time of her death was paid to her administrator, J. H. Merriam. [Tr. pp. 262, 266, 459, 607.]

The $1800.00 so paid on that note which belonged to the estate of Ferdinand Fensky, was appropriated by her individually to her own use and purposely concealed by her from such estate and from the knowledge of these complainants and the remaining $600, which was evidenced by a new note of that amount, owing thereon at the time of the death of Jeanette Fensky, was paid to J. H. Merriam, the administrator of her estate [Tr. pp. 262, 266, 459] and he in turn likewise surpressed and concealed it from her estate, and omitted it from his inventory and accounts. [Tr. pp. 576-578, 653-656.]

And yet the trial court has said that there was no fraud of any kind committed, whilst in this one instance alone appears conclusively an egregious act of fraud.

Frank B. Simms testified: "I borrowed money from Ferdinand Fensky prior to his death" [Tr. p. 320] and that prior to his death he "never had any dealings with his wife, Jeanette Fensky." But we find in the evidence the following in a letter from Mrs. Fensky to Campbell, dated Oct. 21st, 1903:

"I have sent you the Sims note some time since, to have chattel mortgage renewed, and haven't heard whether you received same or not." [Tr. p. 359.]

This note the administratrix never accounted for but converted it to her own benefit.

In Campbell's diary under date of 28th Oct., 1903, we find:

"Wrote a postal to Goodrich telling him I was treating the Simms note as belonging to Mrs. Fensky." [Tr. p. 455.]

On a torn calendar leaf Campbell wrote to Mrs. Fensky, the administratrix:

"*Remember* I am treating the Simms note as yrs." [Tr. p. 286] and see [Tr. pp. 455, 456.]

Nowhere in the record does it appear that the same came into the hands of Mrs. Fensky, except as administratrix of the estate of Ferdinand Fensky. This chattel mortgage due to said Fensky [Tr. p. 455] was collected by Campbell and remitted to Jeanette Fensky [Tr. p. 456], the California administratrix.

The note of George Kimmerle was manipulated in the same manner, Campbell writing to Mrs. Fensky on April 2d, 1904, that he would pay "no attention to it *as administrator*" [Tr. p. 377], also [Tr. p. 378]

When Ferdinand Fensky died $942.82 stood to his credit on the books of the Citizens State Bank of Topeka, Kansas. Sept. 24, 1903, Mrs. Fensky's California lawyer wrote Mr. Campbell:

"She says that she wants you as *administrator* to go to the bank and get what money there is paid upon the contracts and send to her and she will receipt for the same." * * * I do not suppose that the bank would send it to her, as it *would not be proper* for

them or her to do any business of that kind outside of yourself as the agent for her or as the *administrator* of the estate. [Tr. p. 343.]

To this Campbell replied on Sept. 28th:

"I will follow instructions about money in the bank and report soon. I have no doubt they will pay it over to me on my receipt for same." [Tr. p. 349.]

He again wrote Goodrich on Oct. 2.

"The Citizens State Bank wanted to wait till after the 1st of this month before it prepared its statement and hands over the money and papers in its hands and I have not been in since to get the same." [Tr. p. 351.]

Under date of Oct. 5th the following appears in Mr. Campbell's diary:

"I left receipt at Citizens State Bank for the Fensky money. Later in the day the bank sent me draft payable to Jeanette Fensky for $886.57 and draft payable to me for $27.00 having charged $2.25 for cost of exchange and wrote me that it still had a balance in its hands of $25.00." [Tr. p. 454.]

The next day Campbell wrote to Mr. Goodrich:

"I went to the Citizens State Bank yesterday and got statement of account with Fensky, which herewith send you and which shows a balance (after deducting charges of $2.24) *due Fensky,* $942.82." [Tr. p. 355.]

On Oct. 12th, Mr. Goodrich wrote Mr. Campbell:

"Your letter of the 6th inst. with the three drafts, one of $886.57 and the other two of $27.00 each, are at hand, also the bank statement." [Tr. p. 358.]

H. C. McKinley, assistant cashier of the Citizens State Bank in Topeka, after producing receipts signed by "M. T. Campbell, Agt. of Jeanette Fensky, testified,

"My recollection is that the money on deposit in the bank that was taken up by these checks was in the *estate of F. Fensky,* M. T. Campbell, administrator." [Tr. pp. 309, 310.]

On Aug. 3d, 1903, three days before his death, Ferdinand Fensky wrote from California to Campbell, "I have about $2000.00 on 4% in three banks here." [Tr. p. 282.] $1300 of this was traced into the hands of Jeanette Fensky and receipted for by her after the death of Ferdinand Fensky but unaccounted for in his estate. [Tr. pp. 258, 252, 524-529.]

It is evident that Jeanette Fensky's purpose in concealing knowledge of the contracts for the sale and purchase of the Topeka and California land was to prevent the complainants and other heirs from asserting a claim to it and from demanding accordingly that the proceeds of the sales should be distributed according to the *law of California, the domiciliary administration,* as beneficiaries of one-half thereof. There was concealed far more in value, in this one item alone, than the amount paid to the makers of the quit claims.

These acts and omissions, purposely made, and the misrepresentations made by the administratrix in connection therewith were means adopted specially for obtaining the quitclaims, which otherwise she could not have obtained, and they constituted grossly dishonest methods of deception to accomplish that result, and they were done with the full knowledge and pre-

meditation of such dishonesty. Such acts would have been ample grounds for relief against such fraudulent and concealed deceptions in obtaining property from one who had been thus victimized as to whom there were even no *fiduciary relations* existing, but who could have been dealt with at arm's length in other respects, being in such case subject to relief at the instance of such person, from the fraud thus committed upon him, where there was no such fiduciary relation existing, it is positively beyond the bounds of contradiction that in this case at bar where it is admitted that such relations did exist, there could be no dealing at arm's length, but that on the contrary any concealment or want of disclosure of any kind with reference to the matters by the trustees, would of themselves constitute fraud and even though there had been no actual intent to defraud by the adoption of those methods. But here it is undeniable as we repeat they were the result of *actual* fraudulent premeditated methods to obtain the quitclaims.

Without recapitulating the facts and circumstances of this case as disclosed by the proof, it is very evident that the grantors were ignorant of the quantity and value of the estate they were selling, no correct information on this subject was communicated to them by the trustees but the *real value* and conditions was *concealed* and what *was* revealed was *misrepresented* as to its *true value*, and the appellants had no knowledge of the frauds until the year 1912. [Tr. pp. 283-290, 280, 542, 543.]

Campbell remitted to Jeanette Fensky, as shown by his ledger accounts [Tr. pp. 461-505] a total sum of $56,583.73. He sent to her secured notes mentioned in his letter of April 22, 1905, and the same were receipted for by her [Tr. pp. 445-308], which notes were appraised at $7,450.00. [Tr. pp. 295-299.] All of the money and notes mentioned were the proceeds of the estate of Ferdinand Fensky which came into Campbell's hands collected from the assets of the said estate. In addition to the above remittances to the administratrix, Campbell retained, with the consent of Jeanette Fensky, the notes and mortgages belonging to the estate of Ferdinand Fensky as specifically set forth in his letter to her. [Tr. p. 445.]

The inventory filed in the California estate showed a total valuation of property in California of $6700.00. [Tr. pp. 526-529.] This is the total value of property accounted for by the administratrix in the estate of Ferdinand Fensky.

A tract of sixty acres of land in Orange county was in the inventory valued at $1400.00. [Tr. p. 528.] The witness, John Davis, testified that he had bought the south thirty acres of this same tract from Mr. Fensky on contract for $1700.00, and at the time of Fensky's death he owed him $1650.00. The balance due F. Fensky at his death was paid to Jeanette Fensky. This was not accounted for in the estate. About two years afterward he and his son-in-law bought from Mrs. Fensky a piece of land on the north side of the thirty acre tract for $100.00 per acre. [Tr. p. 605.]

Mr. Head, another witness who had known the sixty acre tract for thirty years, testified that at the time the inventory was filed it was worth $40.00 to $50.00 per acre—more than double the amount at which it was inventoried. [Tr. p. 605.]

Lots 9 and 10 of Peck's subdivision of block 74 in the city of San Pedro were valued in the inventory at $3000.00. [Tr. p. 528.] Louis Hansen testified that at the time the inventory was filed the said lots were worth about $10,000.00. [Tr. p. 523.]

Eleven lots in the Carolina Tract were listed in the inventory at $600.00, the witness, Hensen, testified that at the time the inventory was filed in the estate they were worth $4000.00. [Tr. p. 523.]

The plan was to conceal all of the property that could possibly be concealed, and as to the portion that could not be concealed and that they were forced to list in their inventories, was to value it as low as possible. The total value of the estate (as far as has been ascertained by complainants, after extraordinary efforts to learn the facts) in California and Kansas was about $80,000.00, as against the valuation shown in the inventories of about $24,000.00. [Tr. pp. 529, 301, 302.] The settlement was made with the heirs upon the representation that the ultimate value of the estate to be distributed would be about $16,000, after all "expenses" and "losses" were paid.

On or about April 1st, 1905, Jeanette Fensky filed a pretended final account and petition for distribution, in which she represented that she had secured the

interests of all the brothers and sisters and the other heirs at law of her deceased husband and that she was the only one entitled to the said estate. [Tr. pp. 634-639.] On April 11th, 1905, the account was settled and distribution was ordered. [Tr. p. 641.] The decree for final distribution did not recite the status of the property as separate or community.

All of this estate having been the separate property of Ferdinand Fensky at the time of his death, and Jeanette Fensky, having obtained the respective shares of the complainants through deception and fraud, that she held the same during her lifetime in trust for complainants, is undeniable.

This principle is recognized by the law of the state of California in the form of a code section, to-wit: Section 2224 of the Civil Code, which reads:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Equitable Conversion.

A sale of land on contract works an equitable conversion. The vendee becomes the equitable owner of the real estate, and the vendor, the equitable owner of the purchase money.

Equity considers as done that which is agreed to be done. The vendee under a contract for the sale of land takes the equitable title, while the vendor holds

the legal title in trust for the purchaser, and as security for the purchase money due him.

Boone v. Childs, 35 U. S. (10 Pet.) 177, 225, 9 (L. Ed.) 388;

Lewis & Hawkins, 90 U. S. (23 Wall.) 119, 125, 23 L. Ed. 113;

572 L. R. A. 643;

Bissell v. Heyward, 96 U. S. 380, 586, 24 L. Ed. 258;

Sparks v. Hess, 15 Cal. 186;

Gouldin v. Buckelew, 4 Cal. 107.

At the outset let us observe that the Fensky contracts were binding enforcible contracts. [Tr. p. 507.] They were binding obligations on both parties. Mr. Fensky was bound to convey upon receipt of the purchase price and the vendee was bound unconditionally to pay the price named. The purchasers were all in possession of the property they contracted for and were paying taxes thereon. [Tr. pp. 340, 507.] The contracts were enforceable by either party against the other. The vendees complied with their contracts fully, and an equitable conversion took place at the time the contracts were signed by the parties. These contracts of sale of real estate by Fensky worked an equitable conversion of the land into money. His interest ceased to be real estate; it become a *chose in action* and a *personal* demand for the consideration money.

In the case of *William v. Haddock,* 145 N. Y. 144, 39 N. C. 825, he court said:

> "The general rule in regard to contracts for the sale of land is that the owner of the real estate, from the time of the execution of a valid contract for such sale, is to be treated as the owner of the purchase money, and the purchaser of the land is treated as the equitable owner thereof."

In the case of *Bender v. Luckenbach,* 162 Pa. St. 18, 29 Atl. 295, it is held that a contract for the sale of real estate is considered in equity as a conversion of the land into money. The vendor's interest ceases to be real estate; *it becomes a chose in action and a personal demand* for the consideration money, *which in case of death goes to his personal representative,* and *the legal title is held only as security for the payment of the debt.*

In Whittier v. Stege, 61 Cal. 240, it was held:

> "One who enters into possession of land under an agreement to purchase is regarded in equity as owner of an equitable estate in the land, until the performance of his agreement by payment of the purchase money, and then, after payment in full, according to the terms of the agreement, the equitable estate, with which he was clothed before performance, changes into an indefeasable estate; and in either case, he is regarded as the owner of the land and not subject to an action of ejection by his vendor; because, although the vendor is in law the owner of the legal title, he holds it simply as a trustee for his vendee, charged with the duty

to convey it to his vendee on demand." (Citing Love v. Watkins, 40 Cal. 548.)

In Willis v. Wozencraft, 22 Cal. 607, it was held that a vendee, rightfully in possession though having made no payment on the purchase price is the equitable owner of the land, and that courts of equity must protect him, and that the general principle is:

> "*That from the time of the contract* for the sale of land, the vendor, as to the land, becomes a trustee for the vendee, who has a lien upon the land therefor. The position of a vendor, where the purchaser is in possession under the contract, is analogous to that of a mortgagee."

This case is cited in Whittier v. Stege, *supra*.

In Miller v. Waddingham, 91 Cal. 377-381, the court decided that where the vendee was rightfully in possession under a contract of the vendor to convey to him, that although the purchase price was not yet paid, nevertheless the position of the vendee was virtually that of a mortgagor, and that the vendor had no greater rights than that of mortgagee.

See also:

White v. Sage, 149 Cal. 613;
Erhart v. Mahoney, 170 Cal. 148;
Sparks v. Hess, 15 Cal. 186;
Hill v. Grigsby, 32 Cal. 55;
Watson v. Sutro, 86 Cal. 527;
Bodley v. Ferguson, 30 Cal. 512;
Baldwin v. Morgan, 50 Cal. 585.

In the case of *Griffin v. Board of Review*, 184 Ill. 275, 56 N. E. 397, the contract provided that if the purchaser made the payments and performed the covenants set forth in the contract the seller would convey the property to the purchaser, and the purchaser covenanted and agreed to pay the purchase price set forth; that if the purchaser failed to make any payment, or to perform any of the covenants contained in the contract, the contract and all payments made thereon should *at the option of the seller* be forfeited and determined. It was held that the debt due to the seller was personal property and that the retention of title by the seller was but a mode of securing payment of the purchase price of the land.

In the case of *City of Marquette v. Michigan Iron & Land Co.*, 132 Mich. 130, 92 N. W. 934, the contracts contained an agreement on the part of the vendor to sell certain land upon the payment of a specified sum, which the vendee expressly agreed to pay. The contracts contained the usual clauses of forfeiture and an agreement that the vendee should pay all taxes or assessments upon the premises, and provided for a deed to the vendee when all his agreements and undertakings were performed. The court held that by the terms of the contracts an equitable title to the property was at once transferred to the vendee, and that from the time the contracts were made the vendor held the legal title only as trustee for the vendee. The court said:

"The vendor has in effect exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title. The fact that the vendee in the case of the land contract may when making his final payment demand a conveyance, does not distinguish the obligation from that of a credit secured by a mortgage, as the mortgagor may in making his final payment demand a discharge of the mortgage. * * * The resemblance between these obligations and credits secured by purchase money mortgages may best be described by stating that they differ only in this, that the vendor has a remedy to enforce his rights which is not given to the mortgagee, namely: he may take immediate possession of his security. Such an inconsequential difference affords no ground for a legal distinction."

The court cites as authority:

Cooley on Taxation (2 Ed.), p. 78;
People v. Trustees, 48 N. Y. 390;
Ouachita Co. v. Rumph, 43 Ark. 525;
State v. Rand, 39 Minn. 502, 40 N. W. 835;
Perrine v. Jacobs, 64 Iowa, 79 19 N. W. 861;
People v. Rhodes, 15 Ill. 305;
People v. Worthington, 21 Ill. 170, 74 Am. Dec. 86;
Griffin v. Board, 184 Ill. 275, 56 N. E. 397;
Adams v. Clark, 80 Miss. 134, 31 So. 216.

The legal effect of such a contract is to create new or additional property,—a legally enforceable demand

in favor of the vendor to recover from the vendee the unpaid balance of the purchase price; and this remains the rule even if the contract provides for forfeiture upon default of the purchaser.

Griffin v. Board of Review, *supra;*
Reassessment of Boyd, 138 Iowa 583.

In the case of *Dallas County v. Boyd,* 138 Iowa 583, 116 N. W. 700, 17 L. R. A. (N. S.) 1220, it is held that a contract that is not a mere option, but is a contract that may be enforced against the purchaser by proper action in court, in such a credit as is subject to taxation.

In the note following *Dallas County v. Boyd,* in 17 L. R. A. (N. S.) 1220, upon the subject as to whether the amount due under an enforceable contract for the purchase of land is a credit subject to taxation, it is said:

> "All the courts seem to be at one in holding with *Dallas County v. Boyd* that the amount due under an enforcible contract for the sale of land is a credit, and as such subject to taxation in the hands of the vendor, although, as was the case in practically every instance, the contract provides for forfeiture upon default of the purchaser."

The following cases are cited in the note as sustaining the foregoing statement:

Clark v. Horn, 122 Iowa 375, 98 N. W. 148;
Perrine v. Jacobs, 64 Iowa 79, 19 N. W. 861;
Adams v. Clark, 80 Miss. 134, 31 So. 216;

Cross v. Snakenberg, 126 Iowa 636, 102 N. W. 508;

Rheinboldt v. Raine, 52 Ohio St. 160, 39 N. E. 145;

Marquette v. Michigan etc. Co., 132 Mich. 130, 92 N. W. 934;

State v. Rand, 39 Minn. 502, 40 N. W. 835;

Griffin v. Board of Review, 184 Ill. 275, 56 N. E. 397.

Such is the rule in Kansas:

Gilmore v. Gilmore, 60 Kan. 606; 57 Pac. 505;

Williams v. Osage County, 84 Kan. 508; 114 Pac. 858;

Laughlin v. Braley, 25 Kan. 147 (2d Ed. p. 102);

Jones v. Lapham, 15 Kan. 540 (2d Ed. p. 408);

Seaman v. Huffaker, 21 Kan. 262 (2d Ed. p. 191);

Burke v. Johnson, 37 Kan. 337, 15 Pac. 204;

Usher v. Hollister, 58 Kan. 431; 49 Pac. 525;

Curtis v. Buckley, 14 Kan. 449, 454 (2d Ed. p. 345).

See also:

Jones v. Hollister, 51 Kan. 310, 32 Pac. 1115;

Courtney v. Woodworth, 9 Kan. 443;

Campbell v. Kansas Town Co., 69 Kan. 314, 76 Pac. 839;

Comr's. of Dickinson Co. v. Baldwin, 29 Kan. 538.

When a person holds a contract for the conveyance of land to himself from the legal owner upon the payment of certain installments, is in possession of the land and has paid interest on the purchase money, he is the equitable owner of the land, and has such an interest therein that he may encumber such interest by a real estate mortgage to secure a loan.

Laughlin v. Braley, 25 Kan. 147 (2d Ed. p. 102).

In *Williams v. Osage County, supra,* the contracts provided that the respective purchasers should pay the purchase price as specified in the contracts. Upon the question as to whether the contracts were personal property belonging to the vendor, the court said:

> "Each of these contracts includes an unqualified promise to pay—the promise of the purchaser to pay to the seller the remainder of the purchase price of the land, and the seller of the land holds the legal title thereto as security for the fulfillment of such promise. The contract in the possession of the seller is evidence of the indebtedness. The situation, logically, is not much different than if the seller had conveyed the land to the purchaser and taken a note and mortgage back to secure the remainder of the purchase price. The contract as truly constitutes a debt and security therefor as would a note and mortgage. * * * The seller holds the legal title to the land in trust for the purchaser upon his complying with the conditions of the contract, and, undoubtedly, the seller could convey the legal title and assign this contract and his grantee would assume the same relations

> to the purchaser of the land that the vendor had held. * * * Such transfer would not give to the vendor's grantee the right to possession of the land, nor the *equitable title to the land, which under the contracts are possessed by the purchasers.*"

After citing and quoting from a number of authorities, the court, in the *Williams* case, further said:

> "*The purchaser became the owner of the land; the seller became the owner of the debt.* * * * The same may be said, practically, of 'Exhibit A,' except as to the last paragraph thereof, in which it is provided in substance that, if the purchaser fail to make the deferred payments within a reasonable time after the same become due and payable, then the contract 'shall cease and terminate and be forever void.' *This is not making time of the essence of the contract. It is a provision in favor of the seller.*"

The Contracts of Sale of Real Property in Kansas and in California Were the Personal Property of Ferdinand Fensky, and as Such Descended According to the Law of California.

At the time of the death of Ferdinand Fensky, intestate, he was a resident of California. Prior to his death he had sold on contract a large number of lots in Topeka, Kansas, and a tract of land in California. [Tr. pp. 506, 605.] All of the contracts were in California at the time of his death and came into the hands of Jeanette Fensky [Tr. p. 345], the administratrix of his estate. [Tr. pp. 631, 632.]

It is the well established rule that the interest of a vendor in real estate which he has sold or concerning which he has entered into a binding and enforcible contract of sale is personal property of the vendor, and the securities for the purchase money are *personalty,* and in the event of the death of the vendor go to his personal representatives and are distributable as personal property.

Lewis v. Hawkins, 90 U. S. (23 Wall.) 119, 125;

McKay v. Carrington, 1 McLean 50, 50 Fed. Cas. No. 8841;

Secombe v. Steele, 61 U. S. (20 How.) 103;

3 Story's Equity Jur. (14th Ed.), Sec. 1612;

Pomeroy's Eq. Jur., Sec. 105;

Estate of Dwyer, 159 Cal. 680;

Watson v. Sutro, 86 Cal. 527;

57 L. R. A. 646, n.

In Henson v. Ott,, 7 Ind. 512, it is said:

"Had the lands remained unsold at the time of the intestate's death, the record would then have presented a question of construction on the statute governing the descent of real estate. *But as the land was sold in the lifetime of the intestate, the proceeds, whether secured by note or otherwise, became assets in the hands of the administrator,* and without reference to the source whence derived, were governed by the rules prescribed for the descent of personal property."

The syllabus of this case is as follows:

"Where a man has sold real estate and dies intestate, the unpaid purchase money, in *whatever way secured,* becomes assets in the hands of the administrator, and without reference to the source whence the land was derived, the transmission of such purchase money is governed by the rules relative to the distribution of the personal property of intestate."

The interest of the vendor in a partially performed contract to purchase land of which the vendee has been put in possession is *personalty* which passes at once to the personal representative.

Bowen v. Lansing, 129 Mich. 117, 88 N. W. 384, 95 Am. St. Rep. 427, 57 L. R. A. 643;

The case of *Bowen v. Lansing, supra,* is followed in:

Crowley v. McCambridge, 154 Ill. App. 135, 142;

Ostrander v. Davis, Ill. Cir. Ct. App. 636, 191 Fed. 156, 159;

Cropper v. Brown, 76 N. J. Eq. 420, 74 Atl. 987, 139 Am. St. Rep. 770;

McGregor v. Putney, 75 N. H. 114, 71 Atl. 226, Ann. Cas. 1912-A, 193;

Strang v. Hall, 131 Iowa 583, 597, 106 N. W. 631;

Ferres v. Poucher, 152 Mich. 254, 115 N. W. 1054.

See also:

N. Y. C. & H. R. R. Co. v. Cottle, 168 N. Y. Supp. 463, 102 Misc. Rep. 30;

In the case of *Rhodes v. Meredith,* 260 Ill. 138, 102 N. E. 1063, Ann. Cas. 1914-D, 416, referring to the doctrine of equitable conversion, the court said:

> "That doctrine rests on the maxim that equity regards that as done which ought to be done, and the situation presented by this record is a fitting illustration of the maxim. * * * When a valid, enforcible contract has been entered into for the sale of real estate, as between the vendor and the vendee, equity regards the vendee as the owner of the land and the vendor as the owner of the purchase money, which is personalty. * * * Where the owner of real estate thus enters into a valid contract for its sale, the nature of his estate, under the doctrine of equitable conversion, is changed and the real estate will be regarded as converted into personal property, and *in case of the death of the vendor before the contract is performed, it will be treated as assets in the hands of his personal representative.*"

In the case of *Keep v. Miller,* 42 N. J. Eq. 100, 6 Atl. 495, the court held that a contract for the sale of lands which equity would have enforced at the suit of the vendor, created an equitable conversion of the premises from the time of its execution, so that the widow of the vendor, the latter having died intestate after the contract was made, is entitled to her share of the proceeds as personal property.

In Skinner v. Newberry, 51 Ill. 203:

> "Moneys due a testator at his decease, upon contracts for the sale of real estate, made by him

during his life, no deed having been executed, are to be considered a part of his personal estate, the same as other debts due the estate, and the objection, that those contracts which were liable to forfeiture at the death of the testator, cannot be considered as personalty, is without force, since the testator did not assert such right."

In Sutter v. Ling, 25 Pa. St. 466:

"Where a vendor under articles of agreement dies, the right to receive the purchase money passes to his personal representatives."

In Simmons Estate, 140 Pa. 567, 21 Atl. 402:

"By the contract for the sale of land, the estate of the decedent is converted into personalty over which the personal representatives have absolute control."

In Clapp v. Tower, 11 N. D. 556:

"A contract for the sale of real estate, which is valid and enforceable in equity, operates a conversion. The vendor's interest thereafter in equity is the unpaid purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. Upon the death of the vendor his interest passes to his executors as personalty, and continues as such for the purposes of administration; and where such executors have cancelled the contract of sale for default of the purchaser, and thus regained the title, they may sell and convey such real estate, and account to the court of their appointment for the proceeds as personalty, and the title so conveyed is good as against the heirs of the decedent claiming title by succession."

In 11 R. C. L. 124:

> "The interest of a vendor in a partly performed contract to purchase land of which the vendee has been put in possession is considered personalty which passes at once to the personal representative."

In *Gilmore v. Gilmore,* 60 Kan. 606, 57 Pac. 505, the court said:

> "A contract for the sale of real estate works an equitable conversion of the land into personalty from the time when it was made, and the purchase money becomes therefore a part of the vendor's *personal* estate, and as such distributable upon his death to his widow and next of kin."
>
> *Miller's Admr. v. Miller,* 25 N. J. Eq. 354.

The Contracts of Sale Were the Personal Property of Ferdinand Fensky and Descended Under the Laws of California, Where He Was Domiciled at the Time of His Decease.

Estate of Apple, 66 Cal. 434 (6 Pac. 7);
Whitney v. Dodge, 105 Cal. 197 (38 Pac. 636);
Estate of Lathrop, 165 Cal. 247;
Wilkins v. Ellett, 76 U. S. (9 Wall. 740;
Estate of Dwyer, 159 Cal. 680, 115 Pac. 242;
Ennis v. Smith, 55 U. S. (14 How.) 400, 14 L. Ed. 472;
Wilkins v. Ellett, 108 U. S. 256, 27 L. Ed. 718;
Story's Conflict of Laws, Secs. 379, 795;
Frothingham v. Shaw, 175 Mass. 59, 78 Am. St. Rep. 475;
Eells v. Holder, 12 Fed. 668 (Kansas).

In Wilkins v. Ellett, Adm'r, 9 Wall. 740, the court said:

> "It has long been settled and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated."

It was said in Eells v. Holder, *supra,* after citing the foregoing:

> "It follows that the notes and mortgages sued on in this case were assets of the estate of Witte in the state of Ohio, and as such passed to his administrators in that state, who had, according to the plain terms of the statute of Kansas, the right to sue upon them."

The Courts of the United States Are Not Concluded in a Matter of General Equity Jurisdiction by a Decision of a State Court.

These contracts for the sale of real estate in Kansas and California were *evidences of indebtedness* in the hands of the California administratrix, and all of them should have been inventoried by her and distributed in the California estate as personal property.

The learned trial court in passing upon the question of equitable conversion by the contracts of sale of real estate, by Ferdinand Fensky in his lifetime, held that he was controlled and bound by a decision of the Supreme Court of Kansas (179 Pac. 343), construing the contracts as not having worked an equitable conversion, upon being entered into by the parties thereto, and therefore, that decision was determinative of this action as to that and *all other questions involved herein*, as is shown by its opinion filed in this case. [Tr. pp. 194-199.] While the court made no specific mention in his opinion of the contract of sale for the California tract of land, by Fensky, and which was omitted from the inventory of his estate, it appears he considered himself bound by the Kansas decision as to the status of all contracts belonging to the estate of Ferdinand Fensky. Also that comity demanded that he follow that decision, and he further held that he fully agreed with the Kansas court in respect to its conclusions, in, that no equitable conversion took place. We respectfully submit that the trial court erred in each of the above holdings.

It will be observed at the outset that the Kansas decision does not deal in any respect with the construction of a local statute of the state, but exclusively with the meaning and effect of a provision in a private contract. In such a case a federal court will interpret it in accordance with general rules of law governing the construction of contracts, and will never hold itself

bound to adopt a construction which has been placed upon the contract, by the courts of a state.

Kuhn Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140;

Keene etc. Bank v. Ried, 59 C. C. A. 225, 123 Fed. 221;

(*Writ of certiorari* denied in 191 U. S. 567.)

In Swift v. Tyson, 16 Pet. 1, a leading case, in defining and limiting the application of section 34 of the Judiciary Act (Sec. 721 U. S. Rev. Stat.), the Supreme Court, upon the question whether the word "laws" in that section included within the scope of its meaning the decisions of the local tribunals, said:

> "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves whenever they are found to be defective or ill-founded, or otherwise incorrect."

The statute also in terms limits the application of state laws as rules of decision to "trials at common law, in the courts of the United States, in cases where they apply." It does not *therefore apply in equity*, as to which the jurisdiction of the United States courts is derived from the Constitution and laws of the Union, and is the same as that which the High Court of Chancery in England possesses and is subject to neither

limitation nor restraint by state legislation, and most certainly not by mere *oscillating* decisions.

In Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, practically all of the previous decisions of the court are reviewed; and it is made clear, that in the case of the construction of the language of a contract, will, or other instrument of writing, that the federal courts do not follow the state courts in their construction of such instruments, as they do in the construction of statutes.

In the case of Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. 10, in which a *construction of a state statute* was involved the court said:

> "We do not consider ourselves bound to follow the decisions of the state court in this case. * * * The federal courts have an independent jurisdiction in the administration of the state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws, * * * *as they always do in reference to the doctrines of commercial law and general jurisprudence.*"

In *Neves v. Scott*, 54 U. S. 268, it is held that wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and the federal courts will decide what those principles are and will apply them to each particular case as may be found justly applicable thereto.

In *Jackson Co. v. Gardner Inv. Co.,* 200 Fed. Rep. 113, the court said:

> "The rule applicable to proceedings as between two federal courts, that the court will be influenced by the previous action of another court between different parties with reference to the same subject matter is of little force as between state courts and federal courts, because the application of it there would be in the face of the Constitutional and statutory provisions which give citizens of different states, and aliens, peculiar privileges in litigating in the federal courts, we certainly could not apply it to a case where the *facts and the law are so absolutely and positively clear as they are here.*"

Where the question depends upon the general principles of equity jurisprudence this court will not be bound by the decisions of the highest court of the state in which the land in question is situated, but will be governed by its own view of the equitable principles. This being a suit in equity, this court will be governed by its own views of the principles involved.

Russell v. Southard, 53 U. S. 139.

An additional reason for disregarding the decision of the Kansas court is that that opinion was rendered in 1919, while the rights of the appellants herein accrued at the death of Ferdinand Fensky, in 1903.

In *Hart v. Adair,* 244 Fed. 897, 901 (C. C. A. Ninth Cir. 1917), after referring to a decision of the state court that was relied upon by one of the parties, this court said:

> "That decision is not binding upon this court. It does not construe or apply any statute, nor does it create a rule of property. And even if it did, it would not be controlling here; for it was not rendered until a year after the court below decided the case which is now before us, and not until long after the rights of the plaintiffs had accrued under the assignment. A federal court is not bound by the decisions of the highest court of a state in such a case."

In *Loewe v. California State Federation of Labor,* 189 Fed. 714, the court said that in applying general principles of equity, the federal courts determine for themselves what those principles are, untrammeled by the decisions of the state tribunals.

In *Peck v. Ayers,* 53 C. C. A. 553, 116 Fed. 273, the court in answer to a claim that the federal court was bound by a decision of a state court, said:

> "But this is a mere variation of decision in respect of a *principle of general equity*, and we are not aware of any precedent for holding that a rule so established can be admitted to change the doctrines of equity as recognized and applied in the federal courts."

The language in *Gelpcke v. City of Dubuque,* 68 U. S. 176, would indicate that even when a state statute had been construed by the state court, that the court

> *"will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication*

to such an extent as to make a sacrifice of truth, justice and law."

To the same effect was the holding in *Pease v. Peck,* 18 How 595, the court indicating that in its judgment if a decision can be used only as an instrument of wrong and destruction, then, *error ceases to be sacred and principles and truths ought to be reasserted.*

Particularly applicable to the trial court's reasoning that "comity" would require that he follow a decision of the state court, it is said in *Douglas v. Co. Pike,* 101 U. S. 686:

> "Indeed, if a contrary rule was adopted, and the *comity* due to state decisions pushed to the extent contended for, 'it is evident that the provision of the Constitution of the United States which secures to the citizens of another state the right to sue in the courts of the United States might become utterly *useless* and *nugatory.*' "

To the same effect is:

Rowan v. Runnels, 5 How. 139.

In *Ohio Life Ins. & Trust Co. v. Debolt,* 16 How. 432, the court said:

> "Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce."

Where the question involves the interpretation of a contract not in any way dependent upon the construc-

tion of the state law the federal court is not bound to follow the decision of the state court construing the contract, if such construction does not meet with the approval of the federal court, but the latter is bound to exercise its independent judgment.

Bancroft v. Hambly, 36 C. C. A. 599, 83 Fed. 444;

Foxcroft v. Mallett, 45 U. S. (4 How.) 353;

Ohio Life Ins. & Trust Co. v. Debolt, 57 U. S. (16 How.) 432;

Russell v. Southard, 53 U. S. (12 How.) 139;

Knox & Lewis v. Alwood, 228 Fed. 753;

Edward v. Davenport, 20 Fed. 756, 762;

Keene Five Cent Savings Bank v. Reid, 123 Fed. 221;

U. S. Savings & Loan Co. v. Harris, 113 Fed. 28;

Thomas v. Hatch, 3 Sumn. 170, 23 Fed. Cas. No. 13899;

Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 300.

The federal courts are not concluded in a matter of general equity jurisdiction by a decision of a state court.

Flagg v. Mann, 9 Fed. Cas. No. 4847.

In Forsythe v. City of Hammond, 18 C. C. A. 187, the court said:

"The decision of the state court which we are asked to follow seems to us to be in plain conflict

with the weight and general current of authority on the subject."

Federal courts in exercising their jurisdiction founded on diverse citizenship are not bound, either in cases at law or in equity by the decisions of the courts of the state in which they are situated.

Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367.

See also:

Forsythe v. City of Hammond, 18 C. C. A. 175;

Township of Pine Grove v. Talcott, 86 U. S. 666;

Enfield v. Jordan, 119 U. S. 689.

THE CASE OF PICKENS V. CAMPBELL (KANSAS), 179 PAC. 343, IS NOT RES JUDICATA AND THE COMPLAINANTS ARE NOT THEREBY BARRED FROM MAINTAINING THIS ACTION.

The case of Pickens v. Campbell is not *res judicata* for the reason that the defendants in this suit are not the persons nor in privity with the persons in that case, and the further reason that the two actions are entirely different as to subject matter and for the further reason that if the decision in the Kansas case was a correct decision on the law as to whether the contracts constituted realty or personalty, nevertheless, the defendants in this suit are claiming rights to the property as opposed to the ownership and demands of the appellants as owners by descent and as heirs-at-law of Jeanette Fensky, and which question of owner-

ship so acquired by them, formed no part of and was in no way involved in the matters adjudicated upon in the Kansas decision mentioned. It being impossible to have been included therein, being a question peculiarly for the courts of California to determine, to-wit: the succession to property of Jeanette Fensky which was the avails of property which had descended to her from the separate estate of Ferdinand Fensky, this being a question for the jurisdiction of the California courts solely to determine, all of such property being in this state.

To make a former judgment a bar to the maintenance of the present action it must have been rendered in an action between the *same parties,* or between *those in privity* with them.

Aspden v. Nixon, 45 U. S. (4 How.) 467, 11 L. Ed. 1059;

Fowler v. Stebbins, 136 Fed. 365;

Calculagraph Co. v. *Stamp Co.,* 154 Fed. 166.

A former judgment can be pleaded as a bar only by those who were parties to the action in which it was rendered, or who are in privity with such parties.

Hibernian etc. Soc. v. London etc. Co., 138 Cal. 257.

Estoppels must be mutual. If a judgment does not bind a party it cannot inure to his benefit.

Andrews v. Pipe Works, 76 Fed. 166, 173, 19 C. C. A. 548, 36 L. R. A. 139;

In *Aspden v. Nixon,* 45 U. S. (4 How.) 467, 497, 11 L. Ed. 1059, 1074, it is said:

> "The rules of evidence governing courts of justice are, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, to be conclusive, must have been made, 1. By a court of competent jurisdiction upon the same subject matter; 2. Between the same parties; 3. For the same purpose."

In *Privett v. U. S.,* 261 Fed. 351, the rule is stated in this manner:

> "To render a matter *res judicata* there must be a concurrence of four conditions, viz: (1) Identity of the thing sued for; (2) Identity of the cause of action; (3) Identity of persons and parties to the action and (4) Identity of the quality in the persons for or against whom the claim is made."

The case of *Pickens v. Campbell* and the case at bar do not come within the rule. They are not upon the same subject matter, not between the same parties and not for the same purpose. The action now pending here is not against Campbell, but against those who, after the death of Jeanette Fensky, received the benefits of the fraud committed by her, and is for the purpose of requiring them to yield up the property to which the appellants are rightfully entitled as heirs at law of Jeanette Fensky, and to account for property belonging to the estate of Jeanette Fensky claimed by them by means of deeds which were void by reason of the non-delivery thereof, and for the further pur-

pose of requiring the appellant, Merriam, as administrator of the estate of Jeanette Fensky, to account for money and property which came into his hands as such administrator and for which he has not accounted.

Defendants who were not parties to a former suit are not bound by the judgment therein.

Hibernian etc., Soc. v. London, etc., Co., 138 Cal. 257.

In order to constitute a bar to an action it should appear that the former suit was not only about the same cause of action, but between the same parties.

Chase v. Swain, 9 Cal. 130, 136.

Strangers to the record, neither party thereto nor in privity with the parties are not estopped by the judgment nor can they take advantage of it as a bar.

Irving v. Cunningham, 77 Cal. 52;

Chester v. Bakersfield, etc., Ass'n, 64 Cal. 42.

It is immaterial that they may claim under the same common source of title if there is no privity in estate.

Ingersoll v. Jewett, 13 Fed. Cas. No. 7039, 4 Bar. & A. 361, 16 Blatchf. 378.

In Estate of Freud, 134 Cal. 336, it is said:

"In order to make the decision of one court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is put in evidence as conclusive."

It is plain that the Kansas court did not have and could not have had jurisdiction over the matters in controversy in the instant case, or over the appellees herein.

Jeanette Fensky was the administratrix in California of the estate of Ferdinand Fensky and M. T. Campbell was administrator of Ferdinand Fensky's estate *in* Kansas.

Neither is there privity between administrators of the same decedent appointed in different states.

Stacy v. Thrasher, 47 U. S. (6 How.) 44, 58, 12 L. Ed. 337;

Johnson v. Powers, 139 U. S. 156, 35 L. Ed. 112;

Hill v. Tucker, 54 U. S. (13 How.) 458, 14 L. Ed. 223;

McLean v. Meek, 59 U. S. (18 How.) 16, 15 L. Ed. 277.

Consequently a judgment against one is not evidence against the other, and a judgment in favor of one cannot be pleaded in bar by the other.

Braithwaite v. Harvey, 14 Mont. 208, 43 Am. St. Rep. 625.

There is no privity between an executor in one state and an administrator with the will annexed in another, nor between administrators of the same decedent appointed in different states. Estoppels in favor of or against an executor or an administrator by judgment in one state do not bind or affect an administrator

with the will annexed or an administrator appointed in another state.

Wilson v. Hartford Fire Ins. Co., 164 Fed 817, 90 C. C. A. 593, 19 L. R. A. (N. S.) 553.

The term "privity" denotes mutual succession or relationship to the same rights of property.

Greenleaf on Evidence, §523.

In *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43, it is said:

> "There are privies in blood, as the heir is to the ancestor; privies in representation, as is the executor or administrator to the deceased; privies in estate, as lessor and lessee, etc. * * * But there can be no relation of privity between an heir of the deceased and the administrator of the deceased's estate."

In a note in 8 L. R. A. (N. S.), 212, is the following statement:

> "The general doctrine of privity precludes the idea of such a relation between an executor or administrator of an estate and an heir, creditor, legatee, or devisee of such estate. While the executor or administrator is supposed to represent the estate, and, therefore, those interested in it, and he stands in privity with his testate or intestate, yet, because of this fact, it does not follow that he stands in privity with an heir, legatee, devisee, or creditor."

There being no privity between the parties, the judgment in the case of Pickens v. Campbell does not

bar the appellants from maintaining this action against the appellees who are in possession of the assets and unadministered property belonging to the estate of Jeanette Fensky, and against the appellee, J. H. Merriam, her administrator, into whose possession this property came, all of which property was derived through and from the separate estate of Ferdinand Fensky, and to which these appellants are entitled as heirs-at-law of said Jeanette Fensky, deceased. This would be true even though there had been no fraud in the estate of Ferdinand Fensky.

Succession to Property Under the Law of California.

Ferdinand Fensky resided in Kansas for many years [Tr. pp. 621, 622, 267, 261, 319] and there acquired a large amount of property. [Tr. pp. 293-307, 320-326, 506, 507, 309, 261.] He removed to California and took up his residence here in the year 1902. [Tr. p. 621.]

There was no community property law in the state of Kansas, consequently all property acquired by Mr. Fensky in that state was his separate property.

Some of the California property owned by Mr. Fensky at the time of his death was purchased while he was a resident of Kansas [Tr. pp. 629-631] and the remainder was purchased by him within a few months after he took up his residence in California. [Tr. pp. 629-631.]

When he removed to the state of California, where a community property law was in force, the character

of his property was not thereby changed. It remained his separate property and upon his death such of the property as was subject to distribution under the laws of California devolved as provided by law for the descent of the separate property of a husband dying without issue.

Civil Code of California, Sec. 1386, Subds. 2 and 8.

Subdivision 2 of section 1386 reads as follows:

> "If the decedent leaves no issue, the estate goes one-half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one-half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead, then to the other."

All property acquired by the husband in the state of Kansas, either before or after marriage, is, by the law of that state, the separate property of the husband, and it does not lose its character as such when brought into California and invested here.

Estate of Burrows, 136 Cal. 113.

Where property has been acquired outside of a community law state by non-resident married persons, it will not become community property merely because

of the removal of the husband and wife to a community law state.

Estate of Burrows, 136 Cal. 113;
Kraemer v. Kraemer, 52 Cal. 302;
Estate of Niccolls, 164 Cal. 368;
Estate of Higgins, 65 Cal. 407.

All of Ferdinand Fensky's property was his separate property and at his death was succeeded to as such in the manner provided by the laws of California.

Upon his death, one-half of the property went to his wife and the other half to his surviving brothers and sisters and to the descendants of deceased brothers and sisters by right of representation.

Civil Code of Cal., Sec. 1386, Subd. 2, *supra.*

The property having been the separate property of Ferdinand Fensky *at the time of his death,* all property wherever situated, to which Mrs. Fensky succeeded, and the proceeds thereof, which she held at the time of her death and which were subject to distribution under the laws of California, passed to the relatives of Ferdinand Fensky and not to the relatives of Jeanette Fensky.

Civil Code, Sec. 1386, Subd. 8.

This subdivision applies to and embraces all of the separate property of the husband to which the widow succeeded at his death.

Section 1386, Civil Code of California, subdivision 8 of this section at the time of the death of Jeanette Fensky (July 8, 1908) read and now reads as follows:

"8. If the deceased is a widow, or widower, and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and his or her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse and to the descendants of such children by right of representation, and if none, then one-half of such common property goes to the father and mother of such decedent in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such decedent and to the descendants of any deceased brother or sister by right of representation, and the other half goes to the father and mother of such deceased spouse in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such deceased spouse and to the descendants of any deceased brother or sister by right of representation.

"If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequest, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation." (Stats. 1907. p. 568.)

The "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of the same by will.

Hochstein v. Berghauser, 123 Cal. 681, 687.

At the death of Jeanette Fensky the surviving brothers and sisters of Ferdinand Fensky and the descendants of his deceased brothers and sisters by right of representation became and were the "heirs" of Jeanette Fensky.

Estate of Watts, 179 Cal. 20;
Estate of Hill, 179 Cal. 683.

There is no inherent or natural right of inheritance independent of our statute of succession. Section 1386 of the Civil Code affords the only means of ascertaining who are the "heirs" of the decedent. Those who inherit under subdivision 8 of section 1386 take as heirs of the decedent widow or widower, *not as heirs of the predeceased spouse.*

Estate of Watts, 179 Cal. 20.

In the absence of a will and issue the right to succeed to the property of a widow derived from her deceased spouse is regulated by subdivision 8 of section 1386 of the Civil Code.

Estate of Page (Page v. Bryson), 58 Cal. Dec. 448 (not yet published in official reports);
Estate of Davidson, 21 Cal. App. 118.

Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts.

Estate of Nigro, 172 Cal. 477;
Estate of Kirby, 162 Cal. 91.

It is in evidence that Jeanette Fensky never at any time had any property of her own [Tr. pp. 311, 272, 277, 530], except possibly a small amount of money bequeathed to her by a former sweetheart. [Tr. p. 624.]

The commingling of a large amount of the separate funds of the husband with a comparatively trifling amount of the separate funds of the wife will not forfeit the separate estate. The wife in such case at most could only have a claim against the estate of the husband for her funds so commingled.

Estate of Cudworth, 133 Cal. 462.

The property retained its status as separate property even though its form or identity was changed.

The evidence shows that after Mr. Fensky's death, his widow collected and received from the Kansas estate of her deceased husband more than $50,000, and all his California property. [Tr. pp. 461-505, 445, 308, 641.]

In this state property does not lose its character or status as separate property by a mere change in form or identity, or because of the substitution of other property in the usual manner of sale or exchange. The substituted property, and the interest, rights and profits therefrom, retain the character of the property from which they are derived.

Estate of Brady, 171 Cal. 1;
McClure v. Colyear, 80 Cal. 378.

It follows that all property possessed by Ferdinand Fensky at the time of his death, to which Jeanette Fensky succeeded, passed at her death to the surviving brothers and sisters of Ferdinand Fensky and to the issue of his deceased brothers and sisters, by right of representation. This is true as to the proceeds of all property left by Ferdinand Fensky and acquired from his separate estate by Jeanette Fensky, and as to all property in which such proceeds had been invested by her. In short, all property left by Jeanette Fensky at her death descended to her heirs, who, under subdivision 8 of section 1386 of the Civil Code, were the surviving brothers and sisters of Ferdinand Fensky and the descendants of his deceased brothers and sisters.

The Deeds Signed by Jeanette Fensky Were Not Delivered to the Respective Grantees Named Therein, and Are Void.

On September 18th, 1907, Mrs. Jeanette Fensky signed and acknowledged a number of deeds, without any consideration therefor, purporting to convey to certain of the appellees certain real property in Los Angeles county, California, described in the bill of complaint and in the amended complaint. [Tr. pp. 18-23, 191-194.] The grantees claim title to the property therein described by virtue of the said deeds. The evidence shows conclusively that none of the deeds were ever delivered, and therefor, no title passed thereby. This being true, the property described in the

deeds was a part of the estate of Jeanette Fensky at the time of her death, and the same has never been accounted for or distributed in the said estate.

From about 1905, until Mrs. Fensky's death in 1908, the defendant, Don Ferguson, bought and sold real estate for her. [Tr. p. 565.] Mr. Parmele at the time of the signing of the deeds in question was a clerk and notary in Mr. Ferguson's office. [Tr. p. 510.] Mr. Parmele prepared the deeds and went to Mrs. Fensky's house with Mr. Ferguson on the day the same were signed. [Tr. p. 510.]

Mr. Parmele testified that Mrs. Fensky signed the deeds and acknowledged them and that:

"She directed Mr. Ferguson to take the papers and keep them—to continue to have control and charge of the property, and at the time of her death to record the papers covering such properties as she might have at the time of her death. She directed him to sell the property, or handle it just as if the deeds had not been given; that any property she owned at the time of her death covered by the deeds, those deeds were to be recorded." [Tr. p. 511.]

Mr. Parmele further testified that one of the deeds signed and acknowledged on September 18th, 1907, purported to convey to the appellee, Alma J. Schmidt, lot five of the Lewis tract and that prior to Mrs. Fensky's death she sold and transferred this same lot to Chenoweth. [Tr. p. 511.] He further testified that at the time she signed the deeds she assigned two mortgages and that the assignments were placed with

the deeds. [Tr. p. 512.] One mortgage was paid before her death and on January 22nd, 1908, he took Mrs. Fensky's acknowledgment to the satisfaction of that mortgage. [Tr. p. 512.]

On cross-examination Mr. Parmele testified as follows [Tr. pp. 515, 516]:

"Q. Well, give her exact words just as near as you can approximately. I know you want to be fair. Just as near as you can, what she said.

"A. Well, I could give them in substance, and that is all I could do. She directed Mr. Ferguson to keep the deeds in escrow, and to record any covering the property which she might own at the time of her death.

"Q. Did she use those words, 'record any covering property she might own at her death?'

"A. That is my recollection of it, of the substance of it, at least; or to sell or dispose and manage the property.

* * * * * * * * *

"Q. Did she say anything to him as to how he might dispose of any of the property prior to her death?

"A. Not further than to handle it the same as it was her property, the way he had been handling, selling, buying and trading property.

"Q. Did she use those words, that he could sell, buy and trade the property?

"A. Yes."

It is evident from the foregoing testimony that Mrs. Fensky did not make a delivery of the deeds, and the said deeds did not operate as a conveyance of the

property described therein. She told Mr. Parmele to deliver the deeds to Mr. Ferguson, and directed Mr. Ferguson to take them and keep them [Tr. p. 514] and instructed him to continue the handling of her property in the same manner after the signing of the deeds as he had acted prior to that time, to sell, buy and trade the property and to sell any of the property described in the deeds that could be sold at a profit.

Shortly prior to September 18th, 1907, the day on which the deeds were made out and signed, Mr. Ferguson had a conversation with Mrs. Fensky concerning the deeds. Mr. Ferguson, in his deposition, testified concerning this conversation, that, "She spoke about making deeds to her people and that she wanted them all to have a home. She stated that I was to hold the deeds until her death." [Tr. p. 565.]

Mr. Ferguson testified regarding the conversation with Mrs. Fensky on the day the deeds were signed as follows: "I think it was at that time that she said she wanted to know that her people had a home and that if anything was sold, it would be replaced, or words to that effect. She said I was to hold the deeds until her death and then put them on record immediately."

"She told me if I got a chance to sell any of the property at a profit to do it, and that she would make it right, or words to that effect." [Tr. p. 565.]

Mr. Ferguson further testified that after Mrs. Fensky signed the deeds a piece of property de-

scribed in one of the deeds was sold to a person named Chenoweth [Tr. p. 566], and that after Mrs. Fensky's death, he (Ferguson) recorded the other deeds but did not record the deed covering that property signed by her September 18th, 1907, purporting to convey to appellee Schmidt, this same property. [Tr. pp. 567, 572.] He also testified that at the time the deeds were signed, she assigned two mortgages that then stood in her name and that one of the mortgages was paid to her prior to her death. [Tr. p. 567.] (The other mortgage has never been accounted for in any way in her estate.) These instructions as testified to by Parmele and Ferguson completely destroy the claim of the appellees that there was a legal delivery of the deeds on the date upon which they were signed and acknowledged, or, in fact, that the deeds were ever delivered at all. Mrs. Fensky's instructions were that if the property was sold not to record the deed; this applied to each and every parcel described in the deeds.

In *Williams v. Kidd,* 170 Cal. 631, 637, it is said:

> "It is equally well settled that where a deed is deposited with a third party to be handed to the grantee on the death of the grantor, unless this is accompanied by an intention on the part of the grantor that title to the property shall thereby *immediately pass* to the grantee, there is no delivery of the deed and consequently no title is transferred. *If the deed is handed to the depositary without any intention of presently transferring title, but, on the contrary, the grantor*

intended to reserve the right of dominion over the deed and revoke or recall it, there is no effective delivery of the deed as a transfer of title."

Kenney v. Parks, 125 Cal. 146, 57 Pac. 772;
Moore v. Trott, 156 Cal. 353, 134 Am. St. Rep. Rep. 131;
Williams v. Kidd, 170 Cal. 631;
Bury v. Young, 98 Cal. 446.

The essential requisites to the validity of a deed placed in the hands of a third party, is, that it has passed beyond the control of the grantor for all time.

Wittenbrock v. Cass, 110 Cal. 1;
Dean v. Parker, 88 Cal. 284.

In Kenney v. Parks, 125 Cal. 146, 57 Pac. 772, it is said in reference to a delivery to a third person, that:

> "The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them,"

but that in the happening of some event, no title was to vest under the deed.

Can it be said that the deeds "presently became operative and effectual" when Mrs. Fensky expressly reserved the right to dispose of any of the property described in the deeds.

The fact that one deed was made at the same time as the others, but was never recorded, because the

property covered thereby was *sold* and conveyed prior to the death of Mrs. Fensky, is to be considered as a circumstance showing non-delivery of all of the deeds.

Williams v. Kidd, 170 Cal. 631, 645.

In the case of *Keys v. Meyers,* 147 Cal. 702, 704, the court in referring to and quoting from the case of *Bury v. Young*, 98 Cal. 446, 33 Pac. 388, said:

> "The court, distinguishing the case from others of contrary import, says: 'In every case where the deed has been declared invalid by reason of failure of delivery, it will be found that the grantor reserved some rights over the instrument; that he failed to part with all control and dominion over it; that upon the happening of some event, or contingency, or condition, he had the right, if so disposed, to reach out and take it from the possession of the depositary. * * * The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of a third party, it has passed beyond the control of the grantor for all time. That question is determined by the grantor's intention in the matter, and his intention in making the delivery is a question of fact, to be solved by the light of all the circumstances surrounding the transaction.' "

It was contended by the appellees at the trial of this action that even though Mrs. Fensky retained dominion and control over the *property* described in the deeds, yet, that when the deeds were given to

Mr. Ferguson, that she thereby lost control of the *instrument,* and that fact would constitute a delivery. That contention has no force, as is borne out by the authorities.

In Stone v. Daily, 58 Cal. Dec. 462, the court in answer to this same contention, made by the defendants in that case, on page 468, says:

> "Counsel for defendant refer to the language of a number of cases such as *Bury v. Young,* 98 Cal. 446; *Kenny v. Parks,* 125 Cal. 146; *Keys v. Meyers,* 147 Cal. 702; *Moore v. Trott,* 162 Cal. 268, and *Long v. Ryan,* 166 Cal. 442, to the effect that, 'The essential requisite to the validity of a deed transferred under circumstances as indicated in this case, is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time.' But an examination of these cases shows at once that when they speak of the necessity of the control of the instrument passing from the grantor for all time, they mean control in the sense of power to recall it, control over it as an effective instrument of conveyance, not control in the sense of having the mere *physical* custody of it."

In the case at bar the evidence shows that there was no "present passing of title," and that Mrs. Fensky retained dominion over the deeds, as well as over the property.

Another claim made by the appellees is, that these deeds even if not delivered, would operate as a testamentary disposition, as to any of the property not

disposed of by Mrs. Fensky prior to her death. That this was the effect given to the transaction by the defendants claiming under the deeds is evidenced by a letter from appellee Farnsworth to Campbell in Kansas, written prior to the death of Mrs. Fensky, and after the signing of the deeds by her, in which Mrs. Farnsworth says that the disposition made by Mrs. Fensky of her property is, *"to take effect at her death"* [Tr. p. 449], and appellee Merriam also wrote to Campbell (*after* the death of Mrs. Fensky), saying, "Mrs. Fensky *thought* that she could make either a separate will or a separate transfer of every piece of property she had" (in the manner attempted), but that, *"her notion was erroneous."* [Tr. p. 610.] It appears from the statement in his letter that appellee Merriam was familiar with the law on the subject.

It would scarcely seem to need the citation of authorities to controvert this claim that appellees are now making, "that a deed even if not delivered during the lifetime of the grantor would operate as a will" after the grantor's death.

We cite a few authorities as follows:

In *Hayden v. Collins,* 1 Cal. App. 259, the court said:

> "Delivery with intent to pass title is essential to a valid conveyance of real property (*Black v. Sharkey,* 104 Cal. 280; *Kenney v. Parks,* 137 Cal. 531). Appellant admits that the deed was never delivered to him, but seems to rely on a delivery in escrow, but it is absolutely essential to the valid-

ity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, *beyond any power in the grantor to recall or revoke it.* The grantor must clearly and unequivocally evidence an intent and purpose to *part with the possession and control of the deed* for all time. In short, the delivery and transfer must be *irrevocable.* (*Bury v. Young*, 98 Cal. 446; *Kenny v. Parks*, 125 Cal. 146.) The deed was not to *take effect until after Mrs. Hayden's death.* This clearly shows that there could have been no such delivery as is requisite to the validity of any deed. If that deed was not effective as a conveyance during the life of the grantor, it could not become quick with life the moment she died. If delivery with intent to pass title was not accomplished in life, it certainly could not be accomplished after death. * * * The law does not allow a testamentary disposition *by deed.*" (Italics are the court's.)

Williams v. Kidd, 170 Cal. 631, 644;
Walter v. Way, 170 Ill. 96;
Johnson v. Johnson, 24 R. I. 571;
Schlicher v. Keller, 67 N. J. Eq. 635.

If the grantor retains power to regain possession of the deed, but dies without doing so, and the deed is delivered to the grantee in pursuance of the original directions accompanying its deposit, such delivery upon the grantor's death is *not* valid and is *not* effectual to pass title.

Keyes v. Meyers, 147 Cal. 702, 707.

In *Williams v. Kidd,* 170 Cal. 631, the court said:

> "So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect."

Mrs. Fensky's reservation of the right to *sell* the property, and her instruction *not to record the deeds covering such property as might be sold by her prior to her death,* show plainly that it was not her intention that title should "immediately pass to the grantees." And the deeds were "entirely inoperative" as constituting a testamentary disposition of her property.

It is clear that Mrs. Fensky did not divest herself of her title, and therefore this property is a part of her estate, to which these complainants are entitled as heirs-at-law of said Jeanette Fensky, and this is true even outside the question of the property being impressed with a trust in their favor because of the fraud perpetrated upon them in obtaining the quitclaim deeds from them.

A Donato Mortis Causa, Must During the Life of the Donor, Take Effect as an Executed and Complete Transfer of His Possession of the Thing and His Title Thereto.

In *Basket v. Hassell,* 107 U. S. 602, the court in deciding what constituted *"gifts causa mortis"* passed upon the following indorsement:

> "Pay to Martin Basket, of Henderson, Ky.; no one else; then not till my death. My life seems to be uncertain. I may live through this spell. Then I will attend to it myself."
>
> "H. M. Chaney."

The court said in reference thereto:

> "While here, the condition annexed by the donor to his gift, is a condition precedent, which must happen before it becomes a gift, and, as the contingency contemplated is the donor's death, the gift cannot be executed in his lifetime, and, consequently, can never take effect."

In the case at bar the following is one of several writings all identical in form [Tr. pp. 608, 612], under which certain of the appellees claim, as "gifts *causa mortis,*" to-wit:

"Mr. and Mrs. W. C. Stein: Oct. 10th, 1907.
Topeka, Kansas,
Dear Friends:

I have been sick all summer. *In case I should not get well—and pass on*—I want the note of one thousand you owe me to be paid to my two sisters, Amanda Katzung, and Alma J. Schmidt." [Tr. p. 608.]

We think the foregoing quotation from the case of Basket v. Hassell, 107 U. S. 602, determines the status of these writings as not being valid gifts *causa mortis,* it appears that the same condition is here annexed, namely *"the donor's death"* before it was to be an executed gift. These are the letters upon which the administrator (appellee Merriam) based his right to omit the notes of Stein, Campbell and George Fensky, from his inventory.

As further authority on the subject we cite the case of *Noble v. Garden,* 146 Cal. 226, it was there held that where a person retained dominion and control during her lifetime over the property attempted to be given, and received, all income therefrom, there was no gift. The language of the decedent was, "If I should pass away, whatever is left from these certificates deliver to the people to whom they have been assigned." The court said:

> "The title certainly did not vest in the parties to whom the assignments were made, because it was expressly stated that it should remain in deceased. If the title remained in deceased, the transaction shows only an intention to make a gift. By the terms, understanding, and intention of deceased, the gift was not to take effect until her death. In such case the disposition is testamentary and not a gift."

In *Hart v. Ketchem,* 121 Cal. 426, it is said:

> "Unless the property in the thing given vests in the donee it remains in the donor, and there is only

> a purpose of intention on his part to make a gift. Such purpose, or intention, is incapable of enforcement. The delivery must accompany the gift and must be made at the same time. It is the *delivery* by the *donor*, and not the *possession* by the *donee*, that makes the gift effective."

In *Knight v. Tripp*, 121 Cal. 674, 678, the court said:

> "A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor, but by itself it no more establishes the gift than would the same words orally delivered by the donor. * * * It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift."

In *Knight v. Tripp, supra*, it appears (p. 678) that the disposition of the property of the decedent was "limited to the *event of death.*" The court said it was clear that the decedent did not intend "to make a present ,irrevocable gift of the property."

In the instant case Mrs. Fensky undoubtedly limited her attempted disposition to the notes "to the event of death." She wrote in each instance, "In case I should not get well—and pass on—I want the note" to be paid to—(naming the alleged donee). [Tr. pp. 608, 651.]

There was not manifested any intention to give, and there was no delivery of the notes, either actual or symbolic. In the absence of delivery, there was not a gift *causa mortis*.

The evidence shows that the notes were not delivered to the respective alleged donees. The letters written by Mrs. Fensky in October, 1907, did not constitute a symbolic delivery of the notes and they did not constitute a delivery of the means by which the alleged donees could obtain possession of the notes. They were merely conditional orders upon the makers of the notes for the payment of the respective amounts due thereon, the condition being that they should be paid to the persons named in the respective letters "in case of the death" of Mrs. Fensky.

To complete a gift *causa mortis* and make it effective, it is necessary that there be a delivery to the donee, actual or symbolic, before the death of the donor. Where the gift was understood by the donee not to become effective or to confer any right of possession before the death of the donor, the gift is ineffective, and the property belongs to the estate of the donor.

Fite v. Perry, 8 Cal. App. 85.

Mrs. Farnsworth, on May 21, 1908, wrote to Campbell that Mrs. Fensky's disposition of her property by *deed* and etc., was "to take effect at her death. * * * She has signed papers to that effect." [Tr. p. 449.] The evidence is that none of the alleged donees understood that the attempted gifts were to become effective or to confer the right of possession, before the death of Mrs. Fensky.

In 3 Pomeroy Equity Jurisprudence (4th Ed.), §1149, it is said:

> "It is essential to the validity of a donation that the thing given to be delivered to the donee or to his use. Without a delivery the transaction would only amount to a promise to give, which being without consideration, would be a nullity. The intention to give must be accompanied by a delivery, and the delivery must be made with an intention to give."

A gift *causa mortis* is not a testamentary act. If a person intends to make a testamentary gift, which for any reason is ineffectual, it cannot be supported as a donation *causa mortis.*

3 Pomeroy Eq. Jur., §1147;
Basket v. Hassell, 107 U. S. 602.

It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa.* An after acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better.

Miller v. Jeffers, 4 Gratt. (Va.) 472.

If, by the terms of the written instrument as we find in the instant case, the gift is not to take effect until after the death of the donor, it is not a gift but an attempted testamentary disposition of the property. Such limitation is a condition precedent which prevents the gift from becoming absolute in the life-

time of the donor, and the subject of the gift becomes a portion of his estate at the time of his death.

The condition imposed by Mrs. Fensky upon her attempted gifts was, "In case I should not get well —and pass on." [Tr. p. 608, 651.] With this condition attached the title to the notes did not vest in the donees, but indicated only "an *intention* to make a gift," which intention "is incapable of enforcement." There was no delivery of the notes, either actual or constructive, and nothing to convert the revocable purpose into a complete gift.

The Promissory Notes of Stein, Campbell, and George Fensky, Were a Part of the Estate of Jeanette Fensky at Her Death, and Were Omitted From the Inventory by J. H. Merriam, the Administrator of Her Estate.

On Oct. 19, 1907, Mrs. Fensky signed several instruments of writing [Tr. p. 608] all of which were identical in *form* and which the appellee Merriam claims were an "attempt" on the part of Mrs. Fensky to make a gift *causa mortis* [Tr. pp. 612, 613] of the promissory notes described in the respective instruments, and therefore should be upheld as *valid* gifts *causa mortis.*

In order to constitute a valid gift *causa mortis,* as we have heretofore shown, there must be a delivery of the thing given. The evidence shows there was no delivery of the promissory notes to the purported donees.

One letter addressed to Mr. and Mrs. W. C. Stein, stating that in case Mrs. Fensky *"should not get well, and pass on"* she wanted *"the note of $1000.00 you owe me to be paid to my two sisters."* [Tr. p. 608.] Mr. Stein testified that he owed $2400.00 on account of two notes, to *Mr. Fensky* at the time of his death, and thereafter changed the notes into *one note* in *Mrs. Fensky's* name and dated it *prior* to Fensky's death and later paid a part of the money to Mrs. Fensky and made a new note for $600.00 to Mrs. Fensky, that was the last of the $2400.00. [Tr. pp. 261, 262.] The note for $600.00 was produced by Mr. Stein and was read in evidence. [Tr. p. 262.] It is dated January 15, 1908, more than three months after Mrs. Fensky had written the letter upon which the appellee Merriam claims to have acted in distributing the proceeds of a note of $600.00, belonging to the estate of Jeanette Fensky. [Tr. pp. 262, 265.]

Clearly Mrs. Fensky's letter cannot be said to be an "attempt" to make a gift *causa mortis* of a note different in amount from that described in the letter long subsequently to the date of the purported gift.

As to the "attempted" gift of the Campbell note [Tr. p. 608] there was not a delivery, and without such delivery there was no gift.

Mrs. Fensky collected interest thereon until her death in July, 1908. Campbell wrote in his diary on May 6, 1908, that he sent Mrs. Fensky his check for one year's interest and on May 14, 1908, wrote in the same diary that he had received a receipt from Mrs. Fensky for the interest. [Tr. p. 458.]

The "statement" upon which appellee Merriam, administrator of the Jeanette Fensky estate, acted in distributing the Campbell note of $1000, contained the same language as the "statement" addressed to Mr. and Mrs. Stein, to-wit: "In case I should not get well and pass on—I want the note of $1000 you owe me to go to" * * * Minnie Farnsworth and Corrine Loveland, etc. This statement was sent by Appellee Farnsworth to Mr. Campbell in Kansas, shortly after the death of Mrs. Fensky, thereby claiming title to the note. Mr. Campbell responded under date of July 15, 1908, saying:

"Just now received yours of 13" inst., inclosing statement signed by your aunt of 10" Oct., 1907, in regard to my note. Whether this statement constitutes a valid transfer of the note to you and Corrine Loveland, may be questioned, inasmuch as it provides for the transfer to take effect *after* her death. Can't you say *truthfully,* that she turned the note over to you —gave it to you—*before* her death? Does she say anything about this note in her will? If not, that fact would be consistent with her transfer of the note to you *before she died.* In which case there would be no question about it being *your* property and *not* a part of her *estate.*

"If you will send me the note and will knock off the interest since the 1st of June, 1908, I will send you $200 and a new note for $800 dated Aug. 1st, 1908, * * * if I am sure that I will be protected by paying *you* instead of the *administrator* of the estate. * * * If you have to depend on that statement *alone* for your title I am afraid it does not accomplish the purpose. So far as I am concerned

though, I am safe enough in paying it if it is delivered up to me whether I pay it all in money or part in money and part in new note." (Italics are Campbell's.) [Tr. p. 451.]

The above letter was referred to J. H. Merriam, the administrator of the estate [Tr. p. 453] (who was also acting as attorney for appellee Farnsworth in the matter of the estate). [Tr. p. 598.] Merriam answered the above letter on July 24, 1908, saying that Mrs. Fensky had the *erroneous notion* that she could make a disposition of her property in the manner attempted. Also mentions a note of George Fensky of $200, due the estate of Mrs. Fensky, for which George was being held to *account* in some manner, but which note has never been *accounted* for in the estate by Merriam; also asking Campbell to "influence" the "Fensky heirs" to such a "course" so as to avoid a claim by them *in and to* the estate. [Tr. pp. 609-612.] And he further stated that the purported donees named in the statement had signified their willingness to accept the "proposition" contained in his letter, and had left the $1000 note (owing to Jeanette Fensky at the time of her death) with him, and that upon the payment of $200, and the receipt of two new notes payable to the purported donees, that he would cancel and return the former note. [Tr. p. 610.]

The next steps in the transaction are chronicled in "diary" entries by Campbell under date of Aug. 4, and 8th, 1908, telling of a contemplated trip to California and a plan to make a payment on his $1000

note made to Mrs. Fensky, and the receipt of a draft from W. C. Stein, to be delivered to J. H. Merriam, in payment of *his* note to Mrs. Fensky. And that on the 8th of Aug., 1908, that he was in Pasadena in Merriam's office, where he took up his note made to Mrs. Fensky, and delivered the Stein draft to Merriam in payment of the Stein note to Mrs. Fensky. [Tr. p. 459.]

Appellee Merriam testified in regard to the above transactions [Tr. pp. 606, 607, 612, 613], and his testimony clearly shows that he knew these notes were a part of the estate of Jeanette Fensky, of which he was administrator, and for which notes he did not account. All of these notes were a part of the separate estate of Ferdinand Fensky, at the time of his death, or the proceeds thereof, and were also a part of the Jeanette Fensky estate, but were concealed by the appellees.

The $2819.73 in the account of Jeanette Fensky at the time of her death [Tr. p. 598] was derived from the Rost mortgage (which had been illegally disposed of by appellee Farnsworth and Campbell, while Mrs. Fensky was too ill, to even "broach" the subject to her. [Tr. pp. 448, 458-459] and which money and mortgage were the result of the original *Ferdinand* Fensky contract of sale to Rost [Tr. p. 447] and which the appellees stipulated belonged to him in his own right. [Tr. p. 506.]

Out of the above sum J. H. Merriam was paid a retainer fee [Tr. p. 598] (unaccounted for in the

estate) [Tr. p. 613], and the *balance* included in the estate.

Knowledge on the Part of the Administrator, J. H. Merriam, of the Property Belonging to the Estate of Jeanette Fensky, and Omitted From His Inventory and Accounts.

Jeanette Fensky died July 9th, 1908, in Los Angeles county [Tr. p. 625], leaving an estate consisting of cash in one bank amounting to $2,819.73 [Tr. pp. 259, 598]; $800.00 in another bank [Tr. p. 548]; the real estate described in the bill of complaint herein [Tr. pp. 18-20]; note of M. T. Campbell for $1,000.00 [Tr. pp. 458, 459, 607]; note of W. C. Stein for $600.00 [Tr. p. 262]; note of George Fensky for $200.00 [Tr. p. 611]; note of Don Ferguson for $1,050.00 [Tr. p. 578]; and a claim against Mrs. Katzung for $135.00 [Tr. p. 578]; all of the same being the property or the proceeds of property which belonged to the separate estate of her deceased husband, Ferdinand Fensky. Two parcels of real property that were a part of her estate were the identical parcels that had been received by her from her said husband's estate [Tr. pp. 527, 528], and which she attempted to convey to certain of the defendants herein, by deeds which were never delivered.

Mrs. Fensky left a brother and two sisters, the defendants Wellke, Katzung and Schmidt. Upon their petition [Tr. p. 644], the defendant J. H. Merriam was, *on August 1, 1908* [Tr. p. 122], by the Superior

Court of Los Angeles county, appointed administrator of the estate of Jeanette Fensky, deceased.

That on *Sept. 8, 1909*, said Merriam filed an inventory in said estate, alleging that the total assets of said estate was the sum of $3,509.38, consisting of $2,324.38 as money a claim against the defendant Katzung for $135.00, and a note of Don Ferguson for $1,050.00, and alleged that the sole heirs at law of the said Jeanette Fensky were defendants Wellke, Katzung and Schmidt. [Tr. pp. 576-578, 655.] He purposely omitted from said inventory the real property belonging to the said Jeanette Fensky and described in the complaint, the Campbell, Stein and George Fensky notes, $800.00 in the bank and $125.00 cash, and the same were never accounted for in any manner by the said defendant Merriam in the said estate, and the same are unadministered assets of said estate which the appellants claim as heirs at law of Jeanette Fensky and Ferdinand Fensky, deceased.

That at the time of filing his final account [Tr. p. 653] the said defendant Merriam was fully advised of the real estate belonging to said Jeanette Fensky at the time of her death and had full knowledge of the rights of the complainants herein, and knew that the defendants Wellke, Katzung and Schmidt had no interest whatsoever in said property, and knew that the said deeds had not been delivered to the respective grantees named therein. That since the filing of said final account and the distribution of the assets of the estate as contained in the inventory, the said Merriam

had been requested by complainants to further administer on said estate, but has failed, refused and neglected so to do.

J. H. Merriam, while pretending to act as administrator of the estate of Jeanette Fensky, was employed by and acted as the attorney and agent of the defendants Wellke, Katzung, Schmidt and Farnsworth, with the purpose and design of preventing the appellants from securing their just shares of the estate of their deceased brother and of Jeanette Fensky, deceased, and, instead of taking possession and control of all property belonging to the estate, aided and abetted the said defendants in obtaining and in retaining property to which he knew they had no lawful right. Defendant Merriam, although fully advised that Mrs. Fensky's deeds to the other defendants had not been delivered and that the real property in question belonged to the estate, not only made no effort to take control of the same, but, when the suggestion was made that it be turned in as part of the estate, he advised against such a course, and knowingly, purposely and fraudulently concealed the fact that said real estate belonged to the estate of said decedent.

Under the statutes of California, all of the estate of Jeanette Fensky, both real and personal, passed into the possession and control of Mr. Merriam, as admnistrator.

Civil Code of California, Sec. 1384.

It was his duty as such administrator to take charge of any estate, either real or personal, belonging to

her at the time of her death, yet he neither took nor claimed possession of it, but permitted it to pass into the hands of other appellees by whom he had been employed. [Tr. p. 612.]

H. H. Schmidt, son and representative of appellee Katzung in the matter of the Jeanette Fensky estate, testified as did others, that the defendants had many, many conferences in the office of J. H. Merriam in regard to the estate. [Tr. p. 531.]

Mr. Thompson, the representative of the defendant Katzung [Tr. p. 543] testified as follows: "My understanding is that Mr. Merriam expressed a doubt as to the validity of those deeds; that they had not been properly delivered." [Tr. p. 545.] "Q. You said that Mr. Merriam at one of these interviews expressed doubt as to the validity of the deeds? A. There is no question about that. Q. He did so express himself? A. He did, not to me particularly,—in a general way. Q. Did he state the reason for the invalidity? A. That they were not properly delivered." [Tr. pp. 553, 554.]

"Q. The discussion of the invalidity of the deeds occurred how long after Mrs. Fensky's death? I am referring to the discussions at Mr. Merriam's office. A. Well, my understanding, you know, was general, right away to begin with." [Tr. p. 559.]

He also testified that within a short time after Mrs. Fensky's death "it was suggested by Mr. Merriam that this property be pooled and held by us and the deeds set aside," and the reason given by Mr. Merriam

for such advice was "that the deeds were not valid." But that he (Thompson) would not submit to having the property put in the inventory. [Tr. pp. 547-548.]

He also testified as follows:

"We were paying a lawyer five hundred dollars ($500) to inform him of his duty. Q. What lawyer did you pay that to? A. Mr. Merriam." [Tr. p. 561.] He further testified that he had been advised by other counsel, that the deeds were not valid. [Tr. pp. 547, 556.] See also the evidence of Mr. Schmidt [Tr. pp. 531-542] which is most convincing of the fact that Merriam knew of the invalidity of the deeds and advised concealment of the property to deceive the appellants and their co-heirs.

The witness, Henry M. Schmidt, who is the son of the appellee, Alma J. Schmidt, and acted as her representative in the matter [Tr. p. 542], referred in his testimony to the *many* conferences at Mr. Merriam's office, in which the delivery of the deeds were discussed. [Tr. p. 531.] He testified that he and the others "were afraid of the other side (Fensky heirs) attacking the estate," and that they had decided to "leave the deeds stand the way they were." [Tr. p. 533.]

Schmidt further testified that he remembered distinctly that they, at these conferences, discussed the validity of the deeds and the "chance of a contest" [Tr. p. 534]; also that "Judge Meriram advised us as to the matter and also helped in the discussion," and "we were afraid of the other parties coming in and attacking them" (the deeds) and that they dis-

cussed putting the property in the inventory of Mrs. Fensky's estate, that was covered by the deeds. [Tr. p. 537.]

Schmidt also testified [Tr. p. 536]:

"Q. Now, Mr. Schmidt, you stated a while ago concerning this discussion regarding the possibility of a contest with the Fensky heirs that Judge Merriam gave you some advice that helped you considerably. What did he advise you about?

A. Well, one main point of his advice was not to wrangle amongst ourselves, and he satisfied with what we got, and leave the deeds stand the way they were and leave the property stand that way; and also, if we didn't, it might leave the other side (Fensky heirs) a channel to come in and attack us if we got to fighting amongst ourselves." "And it seemed like we were all scared that something would happen about the property." [Tr. p. 536.]

Schmidt also testified concerning the discussion as to whether the property described in Mrs. Fensky's deeds should be put into the inventory in the Jeanette Fensky estate, as follows:

"Q. Who suggested that it be omitted from the inventory?

A. Well, I guess we all did; that it was best not to put it in."

"Q. Well, what advice did Mr. Merriam give you about the inventory?

A. Well, after we discussed it pro and con, we all agreed to let it stand the way it was, thinking it best for all concerned, to leave the deeds stand the way they were." [Tr. p. 538.]

He further testified that appellee Katzung transferred within a few days after Mrs. Fensky's death, all the property she was claiming under the void deeds, to him and his brother, and they later conveyed it back to her, this he said was done to keep the other side (Fensky heirs) from attacking it. And that the other defendants had done likewise with the rest of the property. [Tr. pp. 540, 541.]

Appellee Merriam in the course of his testimony admitted that in 1910 he had testified, at the request of the court, in action between certain of the defendants herein, in reference to the deeds signed by Jeanette Fensky, as follows: in answer to a question as to whether he had suggested including all the property in the probate proceedings, he said that he did not remember having done so, but, that "It came up the question of the validity of the deeds and whether they should be contested in any way." He also said he never thought of questioning the validity of the deeds himself, "except I thought the *heirs of Mr. Fensky* might do it." [Tr. p. 616.]

On July 24, 1908, Mr. Merriam wrote a letter to M. T. Campbell in answer to a letter his client appellee Farnsworth [Tr. p. 598] had received from Campbell, wherein Campbell told her that her claim to his note, *as opposed to the estate*, might be questioned. Appellee Merriam in answer to that declaration, said: "Mrs. Fensky thought she could make a separate will or a separate transfer for every piece of property she had," but her notion was "erroneous." And in refer-

ence to the *Fensky* heirs, he stated: "Many of whom, as I am informed, live in your city, and I thought you might perhaps have an opportunity to influence them to such a course as would avoid litigation." [Tr. pp. 611, 612.]

Mr. Merriam also testified that he had been employed by the relatives of Mrs. Fensky, prior to the writing of that letter. [Tr. p. 612.] Also that the retainer fee paid to him by appellee Farnsworth out of the estate money [Tr. p. 598], was not accounted for by him in his accounts in the estate. [Tr. p. 613.] He further testified that he advised them (the defendants) to carry out what the effort of Mrs. Fensky was to dispose of her property "in the way that this was done" [Tr. p. 619], and he testified, "My recollection is that the heirs (pretended heirs) discussed all those things and *agreed among themselves* that they would raise no technical questions about those things that she had *attempted* to do to dispose of her property —to leave it as she left it, or attempted to." [Tr. p. 613.] And relative to the notes belonging to Mrs. Fensky, he said, "that they were an attempt to make a gift *causa mortis,* and that we decided that that was the intention, and that it should be carried out." [Tr. p. 607.] *He* and *Campbell* decided that question. He receipted for the *Stein* note, owing to the estate as *"Atty. Holder"* [Tr. p. 262], and turned the proceeds over to certain of the defendants.

Appellee Farnsworth, daughter of appellee Welke, testified that she attended the meetings in appellee Mer-

riam's office in regard to Mrs. Fensky's estate [Tr. p. 598] and that the "first question of validity (of the deeds) was raised in regard to the other side—the Fensky heirs." [Tr. p. 681.]

She further testified that: "Mr. Thompson told me that he had seen an attorney, * * * and that the attorney had told him that he considered that these deeds were not delivered." [Tr. p. 626.] And also that on July 23, 1908, she and her father deeded all of the property that they were claiming under these deeds to each other, and the next day executed deeds, conveying the property back to the original holders. [Tr. p. 625.] In answer to a question, if that had not been done because they were fearing a contest from the *Fensky heirs,* she avoided the question, and eventually said, "Perhaps so." [Tr. p. 626.] In this case she testified that she was present when the directions were given to Mr. Parmele and Mr. Ferguson by Mrs. Fensky in regard to the handling of the property after the deeds were signed; but was forced to admit in the course of her testimony that she had testified in another action in 1910 in reference to the same occasion, upon being questioned by Mr. Merriam as follows:

"Q. By Mr. Merriam: Were you present when the deeds were executed in the afternoon?

A. I was not in the same room. My room was adjoining, and I was in the hall and in my room part of the time.

Q. Did you hear any part of the conversation at that time or knew of any of the executions of the deeds?

A. I heard *part* of the conversation, but I didn't consider it important for me to be right there in the room." [Tr. p. 628.]

It seems that the defendant Farnsworth had peculiarly intimate knowledge of the fraud and frauds perpetrated upon the appellants and the heirs of Ferdinand Fensky; she acted as private secretary to Jeanette Fensky during all the negotiations had with Campbell, in procuring the releases and quitclaims from them [Tr. p. 624]; and in the Jeanette Fensky estate, there was a repetition of the frauds.

The evidence shows that appellee Merriam was advised by Mr. Ferguson as to the manner of the signing and the handling of the deeds signed by Mrs. Fensky on Sept. 18, 1907, covering the real property of her estate [Tr. pp. 567, 568, 570, 571]; and that the matter was discussed with the defendants in Merriam's office. [Tr. pp. 567. 571.]

The property belonging to the estate of Jeanette Fensky, and which was fraudulently omitted from the administrator's accounts is as follows:

Twelve parcels of real property in the cities of Los Angeles and Pasadena, described in the bill of complaint [Tr. pp. 18-20], and one tract in San Bernardino county, described in the amended complaint [Tr. p. 193], all covered by the deeds signed by Mrs. Fensky on September 18, 1907. [Tr. pp. 510-513.] Note of M. T. Campbell [Tr. pp. 458, 459, 607]; note of W. C. Stein [Tr. pp. 262, 459, 607]; note of George Fensky [Tr. pp. 611, 612]; cash paid to J. H. Merriam

[Tr. pp. 598, 613]; cash in bank [Tr. pp. 257, 548, 549]; Webster mortgage [Tr. pp. 512, 567].

Mr. Wm. Thompson testified that there were several parcels of real estate that Mrs. Fensky was buying on contract, which are unaccounted for in her estate. A total of $3509.38 was inventoried by the administrator [Tr. p. 578], and in his final account he charges himself only with the said sum of $3509.38. [Tr. p. 653.]

Appellee Merriam was appointed administrator of the estate of Jeanette Fensky on August 1, 1908. For some time after his appointment he took no steps whatever looking to the administration of the estate, but on September 8, 1909, he filed a pretended inventory, showing the above total of property, and upon the coming in of said inventory filed a purported final account in which he represented that property of the intestate in Kansas had been wholly administered and distributed. That administration was not closed until the 21st day of December, 1914. [Tr. p. 318.] And further represented that the said Jeanette Fensky left as her sole heirs-at-law the defendants Wellke, Katzung and Schmidt. [Tr. p. 655.]

Equity Will Declare Those Holding Property That Rightfully Belongs to Another, a Trustee for the Thing Gained.

All of the estate left by Ferdinand Fensky was property or the proceeds of property acquired by him in the state of Kansas while he was a resident of that

state and where he was a resident until his removal to California in 1902. [Tr. p. 621.] Jeanette Fensky had no property of her own. [Tr. pp. 272, 277, 530.] Upon the death of Ferdinand Fensky's widow, Jeanette Fensky, the property acquired by her from her deceased husband's separate estate vested in the surviving brothers and sisters of Ferdinand Fensky and the descendants of his deceased brothers and sisters, and not in the brothers and sisters of Jeanette Fensky. (Civil Code, sec. 1386, subd. 8, *supra.*)

That one who acquires land or other property by fraud or mistake, or under any circumstances as would render it inequitable for him to retain it, is in equity regarded as a trustee of the party who suffers by reason of the fraud or other wrong, and who is in equity entitled to the property, is so well settled as to scarcely warrant discussion here. However, we will briefly touch upon this matter and cite a few of the leading cases on the subject.

This principle is recognized by the law of the state of California in the form of a code section, to-wit: Section 2224 of the Civil Code, which reads as follows:

> "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

In all cases of this character a constructive trust will be impressed upon the property so acquired in

favor of the person equitably entitled thereto. This will obtain although he may never have had any legal estate in the property.

A leading case on this question is that of Bacon v. Bacon, reported in 160th Cal. at page 150. This action arose through a mistake in the reading and probating a will, in which the word "ten" was, through mistake, read as "two," and by reason of the mistake certain legatees named in the will received $2000 each instead of $10,000, the amount intended to be inserted by the testator, and the suit was brought to obtain a judgment for the unpaid balance of $8000 with interest; the action being brought some three years after the distribution of the estate. Judgment was rendered for the plaintiffs, from which the defendants appealed. The Supreme Court sustained the decision of the trial court, and in a well considered decision held that the Superior Court had jurisdiction of the action and power to review the decree of distribution and to declare that the defendants held as involuntary trustees of the plaintiff the property obtained by them through the decree of distribution. In rendering its opinion, the court followed its decision in the case of Sohler v. Sohler, 135 Cal. 323. Other cases so holding are:

Wingerter v. Wingerter, 71 Cal. 105;
Sanford v. Sanford, 139 U. S. 645, and
Estate of Walker, 160 Cal. 549.

The facts in this latter case were as follows: William Walker, a resident of the county of Santa Cruz,

died supposedly intestate, and letters of administration were issued, administration upon the estate was duly made and the decree of final distribution was made and the decree of final distribution was made and entered, and the property delivered to the distributees and the administrator discharged. More than eight months thereafter one Frank D. Enor filed an alleged will of the deceased and petition for its probate. The distributees contested and in their contest set up the facts above related. A demurrer to the contest was sustained and the will ordered omitted to probate. The distributees appealed from this order.

The Supreme Court sustained the order of the trial court, and a portion of its opinion reads as follows:

> "Respondent's position is that neither the order admitting the will to probate, nor the effect of that order, is in any wise an attack, direct or collateral, upon the decree of distribution; that if through accident, fraud or mistake, the distributees are holding property under the decree, to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees of the rightful owners of the property. This principle is, of course, well established. (Civ. Code, Sec. 2224; State v. McGlynn, 20 Cal. 233 (81 Am. Dec. 118); Wingerter v. Wingerter, 71 Cal. 105 (11 Pac. 853); Mulcahey v. Dow, 131 Cal. 73 (63 Pac. 158); Sohler v. Sohler, 135 Cal. 323 (87 Am. St. Rep. 98, 67 Pac. 282); Parsons v. Weis, 144 Cal. 419 (77 Pac. 1007); Bacon v. Bacon, 150 Cal. 481 (89 Pac. 317); Insurance Co.

v. Hodgson, 7 Cranch, 332 (3 L. Ed. 362); Case of Broderick's Will, 21 Wall, 503 (22 L. Ed. 599).)"

See also:

Estate of Hudson, 63 Cal. 457.

The principle we contend for here is well stated in Pomeroy's Eq. Jurisprudence at page 155, in which the author says:

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner."

In Pomeroy's Eq. Jur. 919, it is said:

> "Where a probate is obtained by fraud, equity may declare the executor or the other person deriving title under it a trustee for the party defrauded."

In the Estate of Walker (Cal.), 117 Pac. 511, Chief Justice Beatty in his concurring opinion said:

> "But if it turns out that there was a will which was suppressed by an heir for the purpose of defrauding devisees or legatees, or, as in this case, lost and undiscovered until after distribution, the remedy of the devisee or legatee against

> the heir who has received what was his is in equity to charge the heir as his trustee, and to require him to account and to transfer what he has acquired through the fraud, accident, or mistake."

In this connection we would call the attention of the court to the fact that the evidence specifically shows that at least two pieces of the real estate belonging to Ferdinand Fensky at the time of his death remained in the hands of the widow, Jeanette Fensky, at the time of her death, although she attempted to convey it to the defendant Amanda Katzung by deed which was never delivered. And also that the balance of the said real estate and other property was acquired by her by the use of the money obtained from the estate of her said deceased husband. Under the circumstances of this case it must be held that all the property in the hands of Jeanette Fensky at the time of her death was impressed with a trust in her hands for the benefit of these complainants, and the character of this trust could not be changed by investing the funds in other property and taking title thereto in the name of another.

See:

McClune v. Collyear, 80 Cal. 378.

See also Pomeroy's Eq. Jur., Sec. 918 *et seq.,* 2nd Ed., in which he says:

> "The remedy which equity gives to the defrauded person is most extensive. It reaches all those who, were actually concerned in the fraud,

> all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice. A court of equity will wrest property fraudulently acquired not only from the perpetrators of the fraud, but, to use Lord Cottenham's language, 'from his children and his childrens' children,' or, as elsewhere said, from any persons amongst whom he may have parceled out the fruits of his fraud. There is one limitation: if the property which was acquired by fraud has come by transfer into the hands of a *bona fide* purchaser for a valuable consideration and without notice, even though his immediate grantor or assignor was the fraudulent party himself, the hands of the court are stayed and the remedy of the defrauded party, with respect to the property itself is gone; his only relief must be personal against those who committed the fraud."

In the case at bar the only claim made by the defendants to the property obtained from the estate of Jeanette Fensky is that they are next of kin of the said Jeanette Fensky and by virtue of the undelivered deeds. There is no superior equity nor any equity at all in favor of these defendants as against the plaintiffs, hence no such limitation as that mentioned above exists in this case.

As to the defendant J. H. Merriam, the administrator of the estate of Jeanette Fensky, under the California statutes, all of her estate passed into his possession and control, and it was his duty as such administrator to take charge of any estate, either real or personal, belonging to her at the time of her death.

He knew of the condition and circumstances of the deeding of the property to the defendants, and yet he neither took or claimed possession of it.

We submit that under these facts as proven by this record there can be no question but that plaintiffs are entitled to the relief prayed for.

It is proven that all the property belonging to the estate of Ferdinand Fensky was his separate property, such being the fact, then under the laws of the state of California in effect now and at the time of the death of Jeanette Fensky governing the distribution of estates of decedents, these complainants, and not the defendants Katzung, Wellke and Schmidt, nor any other of the defendants, were the heirs of Ferdinand Fensky and the said defendents were not entitled to any part of the estate of Jeanette Fensky.

See section 1386, Civil Code of California, subdivision 8 of this section, *supra*.

It is clear that under the second paragraph of this subdivision above cited, Ferdinand Fensky having died without issue, and all his property at the time of his death being his separate property, that the same on the death of Jeanette Fensky would go to his heirs and not to the next of kin of Jeanette Fensky. This would be true, even though the property, or any part thereof, obtained by Jeanette Fensky from the estate of Ferdinand Fensky had not been procured through the fraud perpetrated upon the complainants.

Furthermore, the property claimed to be owned by defendants through the deeds signed by Jeanette Fensky

but not delivered during her lifetime, belongs to the estate of Jeanette Fensky, for it is unquestionably the law universally laid down by all courts, that a deed signed by a person but not delivered during his lifetime vests no estate or interest in the property therein described in the grantee named therein, but that it is void.

The property described in these undelivered deeds having been obtained by Jeanette Fensky from the proceeds of the estate of her deceased husband, the same being his separate property, passed under the section of the California code above quoted, to the heirs of Ferdinand Fensky, including these complainants.

We do not see how it can be questioned that under the facts alleged in the bill of complaint and proven in this case, states a complete cause of action for an accounting against the defendants, and that the complainants are entitled to the relief prayed for.

The Purported Decree of Distribution in the Estate of Jeanette Fensky Is Void Because the Statutory Notice of the Hearing of the Final Account and Petition for Distribution Was Not Given.

Where, by reason of a defect in the procedure attending the giving of such constructive notice as is required by law to be given in order to vest jurisdiction in the court, the parties did not receive such constructive notice, all subsequent action of the court

based thereon is subject to attack, either in the same proceeding or in a later equitable action.

In the matter of the estate of Jeanette Fensky the first and final account, report and petition for distribution of the appellee, J. H. Merriam, as administrator with the will annexed [Tr. p. 653], was filed September 8th, 1909. [Tr. p. 656.] By the endorsement appearing upon the said petition, it appears that the clerk set the hearing of the same for September 22nd, 1909. [Tr. p. 657.] The notice given and posted by the clerk of the settlement of the final account and hearing of petition for distribution recited that "the 22nd day of *July,* 1909, has been appointed as the day for the settlement," etc., instead of the 22nd day of *September,* 1909. [Tr. p. 661.]

Admittedly, the notice referred to was void for the reason that the date specified therein for the hearing was prior to the filing of the petition and prior to the posting of the notice.

On the 22nd day of September, 1909, the final account and petition for distribution came on for hearing and the court thereupon entered a purported "order settling final account and petition for distribution." [Tr. p. 663.] By reason of the fact that no valid notice of the hearing of the final account and petition for distribution had been given by the clerk, the court did not acquire jurisdiction to make an order settling the final account and for distribution, and the same of necessity is void unless, as contended by the appellees, the same can be sustained by reason of other

purported proceedings taking place in the matter of the said estate. Clearly the position of the appellees is not tenable,—the other purported proceedings do not tend at all to sustain the order settling the final account and the order for distribution.

The powers of the Superior Court in the administration and distribution of estates are limited and special, and are purely statutory. The court is circumscribed by the provisions of the statute, and may not proceed in a manner essentially different from that provided by law.

Smith v. Westerfield, 88 Cal. 374;
Estate of Strong, 119 Cal. 663, 667;
Reither v. Murdock, 135 Cal. 197, 201;
Estate of Dolbeer, 153 Cal. 652, 657;
Curtis v. Schell, 129 Cal. 208, 220;
Clark v. Superior Court, 20 Cal. App. 305, 309.

Whenever the acts of the court are shown to have been in excess of the power conferred upon it, or without the limits of its special jurisdiction, such acts are nugatory and are not binding upon anyone, not even upon one who has invoked its authority or submitted to its decision.

On September 11th, 1909 [Tr. p. 662], *after filing* his final account and petition for distribution, but *before the hearing* of the same, the appellee, Merriam, filed a so-called "supplemental petition for distribution." [Tr. p. 657.]

The matter of settling the final account of an executor or administrator does not necessarily involve the matter of the distribution of the estate.

In fact, the only manner in which the court can acquire jurisdiction to settle the *final account* and make *distribution* at one and the same hearing is pursuant to section 1634 of the Code of Civil Procedure, and if the notice is not given as required by that section, the court cannot act.

Sections 1633 and 1634 of the Code of Civil Procedure are as follows:

> "1633. When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper.
>
> "1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings."

The provisions of section 1634 apply only when the petition for distribution is filed *"with"* the final account

and *not* when it is filed *after* the filing of the final account.

In *Estate of Sheid,* 122 Cal. 531, the court had under consideration a decree of distribution made upon a petition filed *after* the filing of the final account but *before* the settlement of the same. There the court said:

> "But whatever the reason may be, we find no authority for filing a petition for distribution at any time prior to the settlement of the final account unless it is filed 'with' it. This is a special proceeding, based upon the statute, and involving title to property, both real and personal, and in which the jurisdiction of the court can be acquired only by the observance of its provisions."

On the same point see:

> Coursen's Estate, 6 Cal. Unrep. 756, 65 Pac. 965.

Section 1665 of the Code of Civil Procedure provides:

> "*Upon* the final settlement of the accounts of the executor or administrator, or *at any subsequent time,* * * * the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto."

A decree of distribution cannot be made until after the final account of the administrator has been settled.

> Code of Civil Procedure, Sec. 1665 (*supra*);
> Estate of Spreckels, 165 Cal. 597, 606;
> Smith v. Westerfield, 88 Cal. 374.

The final account of the appellee, Merriam, as administrator with the will annexed of the estate of Jeanette Fensky, has never been settled. The purported order settling the final account and for distribution [Tr. p. 663] is void by reason of the fact that no notice of the hearing thereof was given. The notice given by the clerk [Tr. p. 661] that the hearing of the final account was set for *July 22* was a nullity. The paper denominated "supplemental petition for distribution" [Tr. p. 657] did not contain any report or account of the administrator, so that even if a notice of the hearing of the "supplemental petition" had been given, the same would not have operated as a notice of the hearing of the final account.

Section 1638 of the Code of Civil Procedure reads as follows:

> "The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact."

It is the duty of the Probate Court to require proof and to determine that notice of hearing has been given as provided by law before it has power to settle an account or to order distribution.

> Code of Civil Procedure, Sec. 1638 (*supra*);
> McClellan v. Downey, 63 Cal. 520.

Unless notice of the day on which the settlement of an account of an administrator is to be heard is given as prescribed by sections 1633 and 1634 of the Code

of Civil Procedure, there cannot be a valid settlement of the account.

Estate of Spanier, 120 Cal. 689, 701.

The decree [Tr. p. 663] does not recite and the record does not show that it was proved to the court that any notice was given. Without either a finding by the court or an affirmative showing in the record, we cannot presume that notice was given.

In *Bekett v. Selover*, 7 Cal. 233, the affidavit under consideration stated that notices had been posted in three "*different* places" instead of in three "*public* places" as required by statute. The statute provided that "an entry in the minutes of the court, that proof was made that notice had been given according to law, shall be conclusive evidence of the fact of such notice." The entry in the minutes was that "on due proof of posting notice of the time and place of hearing having been made," etc. It was held that this was not a compliance with the statute; that it was not in the language of the statute, or substantially the same in meaning; that it was confined to "due proof of posting notice of the *time* and *place* of hearing," while the statute required the notices to state the "name of the deceased, the name of the applicant, and the term of court at which the application will be heard."

The proceedings are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon that question must appear affirmatively.

McDonald v. Katz, 31 Cal. 167.

In Hasting v. Cunningham, 39 Cal. 142, the court said:

> "Every intendment may be indulged in favor of the validity of the proceedings not inconsistent with the record. This is a rule of evidence, by the light of which we are to interpret the record, but it is not a rule which authorizes us to dispense with a substantial compliance with all the conditions of the statute. Read by the light of this rule, *the record must show* such a compliance."

In *Pioneer Land Co. v. Maddux,* 109 Cal. 634, and *Pearson v. Pearson,* 46 Cal. 610, it is held that the presumptions that are implied to support a judgment arise only when the record is silent as to the jurisdictional facts, and that when the record states what was done, it will not be presumed something different was done.

In the Jeanette Fensky estate the decree did not recite or show that proof was made of proper posting of the notice of hearing, as required by section 1638 of the Code of Civil Procedure. [Tr. p. 663.] The only evidence of the posting of any notice whatever is the affidavit of posting the *void* notice of the hearing of the final account and petition for distribution. [Tr. p. 661.] *No proof of the posting of any other notice can be presumed.*

In the Matter of Tracey, 136 Cal. 385, it is said:

> "In all cases where constructive service of notice is allowed to parties in interest who have no actual notice and who do not appear and subject

themselves to the jurisdiction of the court, the mode of service prescribed by the statute must be strictly pursued."

Statutes which dispense with actual personal service of process, and provide for a method less certain and satisfactory, must be strictly pursued.

Pollard v. Wegener, 13 Wis. 636.

Where service was made by publication and the judgment roll does not contain an affidavit that summons was in fact published, the judgment is void.

People v. Greene, 74 Cal. 406;

Hyde v. Redding, 74 Cal. 493.

In the case of Forbes v. Hyde, 31 Cal. 343, 355, it was held that where, because of a total absence from the record of any legal evidence tending to prove an essential jurisdictional fact, the order for publication of a summons and the publication in pursuance of such order were void, the court failed to acquire jurisdiction of the person of the defendant against whom publication was directed.

If it appears by the record, or otherwise, that the court did not acquire jurisdiction, the judgment will be pronounced a nullity whether it comes directly or collaterally in issue.

McMinn v. Whelan, 27 Cal. 300.

The appellees, in order to uphold the decree of distribution, apparently base some reliance, more or less remote, upon a "presumption" that a notice of some

kind, which does not appear in the record, was posted in connection with the so-called "supplemental petition for distribution," which was filed *after* the filing of the final account. [Tr. pp. 653-656, 657-660.]

There is no provision in the statute permitting any petition for distribution to be heard and allowed at the time of settling the final account, unless the same is filed *with* the final account.

Code of Civil Procedure, Sec. 1634 (*supra*);
Estate of Shied, 122 Cal. 531.

The purported decree of distribution does not recite that the notice required by law was given [Tr. p. 663], and the fact of the giving of such notice has not been shown by extrinsic proof. The record shows the posting of a void notice [Tr. p. 661], and this court cannot indulge the presumption that any other notice was posted or that the court acquired jurisdiction to enter a decree of distribution.

At the trial the appellees contended that the decree of distribution and the final discharge of the administrator were sustained (1) by the presumptions stated in section 1963 of the Code of Civil Procedure, (2) by the entries in the register of actions, (3) by the evidence of a deputy county clerk whose duty it was to post notices in probate proceedings.

(1) The presumptions stated in section 1963 of the Code of Civil Procedure do not sustain the decree.

The Supreme Court of California has taken a different view from that advanced by the appellees.

In *Estate of Sharon,* 179 Cal. 447, 458, it is held that the presumptions stated in section 1963 "that official duty has been performed" (subdivision 15), and "that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction" (subdivision 16), "are not to be construed to dispense with the necessity of proof of the facts essential to the *jurisdiction* of an inferior court or tribunal," but that these provisions "apply only to the acts of such inferior court *after jurisdiction of subject matter and person has attached.*" It was further held that the fact that the inferior tribunal acted does not raise the presumption that the jurisdictional facts existed, but that such facts must be proven, either by the record or by other evidence.

In the *Sharon* case the court said:

> "In no case has it been held that the fact that a judgment or order was made and that it appeared on the record, or the presumption that official duty has been regularly performed, was sufficient proof of the jurisdiction of an inferior court or tribunal."

The law will presume in favor of the regularity of an official's act, but *it will not presume in favor of jurisdiction to perform the act.*

1 Jones on Evidence, §45a.

Where one relies on an adjudication of a court of limited or special jurisdiction, including the Superior Court acting in the administration of estates, every

fact necessary to confer jurisdiction must be shown affirmatively.

Estate of Sharon, 179 Cal. 447, 457.

(2) The entries in the register of actions do not supply the necessary proof of the posting of the notice.

The purported "supplemental petition" bears the endorsement that the hearing of the same was set by the clerk for the 22nd day of September, 1909. [Tr. p. 660.]

The record does not show that any notice of the hearing of this purported "supplemental petition" was ever given.

In order to supply this defect, the appellees offered at the trial the testimony of Charles Glaze, formerly deputy county clerk, and also a certified copy of the entries on the register of actions in the matter of the estate of Jeanette Fensky, deceased. [Tr. p. 741.] The entries in the register of actions applicable to this matter are as follows:

Sept. 8 1st & Final acct. & Report & Petn. for Dist. filed
" 11 Supplemental petition for dis filed
" 11 Notice set final acct. hearing pet & aff filed
" 13 " hearing pet for dis filed
" 22 Acct. settled & dist. ordered

The foregoing entries in the register of actions do not show that any notice of the hearing of the "supplemental petition" was given.

Nowhere in the register of actions does it appear that the supplemental petition was set for hearing, nor does it appear that any notice of hearing was given. It does not even appear that the notice which seems to have been filed on September *13th* was ever posted or that any affidavit was attached to the said notice. The inference is that no affidavit was attached thereto, because in the entry of September 11th, it appears that an affidavit *was* annexed to the notice filed on that day. The only notice filed on September 11th was the one hereinbefore referred to, which purports to give notice of the hearing on *July* 22nd, instead of September 22nd. [Tr. p. 661.]

The register of actions fails to supply the deficiency for other reasons. It does not indicate the form or the contents of the notice; it does not show that legal service or any service thereof was made; it does not show when or where or for what length of time the notice was posted, if at all, and does not show that the same was ever posted; neither does it show that the notice contained the matters required by section 1634 of the Code of Civil Procedure to be contained therein.

There is no presumption in favor of jurisdiction, but the facts conferring jurisdiction must be made to appear.

Estate of Sharon, 179 Cal. 447.

Even if a notice of the hearing of the "supplemental petition" was posted we cannot presume that it was posted ten days, as required by statute, before

September 22nd. Aside from the void notice, which was filed September 11th, the only notice referred to in the register of actions was filed September *13th,* —less than ten days prior to the 22nd.

Furthermore, the register of actions is not a part of the record and does not constitute evidence of the performance of any act. However, considering it for what it may be worth, it does not show the *posting* of any notice of the time and place of the hearing of the so-called "supplemental petition." It merely shows [Tr. p. 742] that on September 13, "notice hearing set for dis filed." This would not give the ten days' notice required by section 1634 of the Code of Civil Procedure. If from this entry we might presume that a notice of the hearing of the petition for distribution was filed, we cannot presume that the notice was posted or that any proof of posting was ever made; neither can we presume that any notice of the hearing of the final account was given other than the void notice [Tr. p. 661], which was filed September 11, 1909 [Tr. p. 662], an entry of which appears on the register of actions as of that date. [Tr. p. 742.]

From the recitals in the register of actions alone, the court could not have made a finding that due and legal notice of the hearing had been given.

(3) The evidence of the deputy county clerk does not establish the posting of a valid notice.

Mr. Glaze who, in September, 1909, was assistant clerk in Department 2 of the Superior Court of Los

Angeles county, was called as a witness by the appellees in their efforts to show that a notice of the hearing of the supplemental petition for distribution was given. [Tr. p. 739.] Mr. Glaze testified concerning a custom of the county clerk's office with reference to the manner in which papers were stamped and the manner in which notices were made out and posted. He stated that *after* September 11th,, 1909, he did not post "any notice in the matter of the estate of Jeanette Fensky of a hearing for final disribution." [Tr. p. 739.] Mr. Glaze produced a blank notice of hearing which he stated was the form which he used in giving notice of the hearing of the supplemental petition. [Tr. p. 743.]

If it be true that the blank form produced by the witness was used in giving the notice of hearing of the supplemental petition, it is wholly insufficient. It does not purport to give notice of the settlement of the final account, or the day appointed for the hearing thereof, as provided in section 1633 and 1634 of the Code of Civil Procedure, *supra*. The blank form produced by the witness is a form of notice that a petition for *"final distribution"* will be heard, but no mention is made of the *final account*.

If the account be for a *final settlement* accompanied by a *petition for distribution, the notice must state those facts,* and must be for at least the time prescribed by the statute.

> Code of Civil Procedure, Sec. 1634, *supra;*
> Estate of Grant, 131 Cal. 426, 429.

The form of notice that the appellees are asking this court to presume was posted does not purport too meet the requirement of the statute.

The situation in the instant case is very similar to that in *Estate of Sharon,* 179 Cal. 447, where an attempt was made, as here, to prove the jurisdiction of the court by the evidence of two deputy county clerks who, some years previously, had seen the papers that were later destroyed; one of them had made entries in the "rough minutes" of the court, concerning the proceeding, and the other had filed and indexed the papers; neither of them could state what was contained in any of the papers. The court held that this evidence did not constitute secondary proof of the contents of the lost papers, nor did it establish the jurisdiction of the court.

Furthermore, Mr. Glaze expressly stated that he could only say "approximately, but not absolutely, what the contents of that notice were." [Tr. p. 740.] This same witness was the deputy clerk who prepared and posted the notice of hearing of the final account and petition for distribution in which he gave notice that the same would be heard *July* 22, instead of *September* 22. [Tr. pp. 661, 662.] We cannot assume that Mr. Glaze was more accurate in preparing the notice of hearing of the supplemental petition than he was in preparing the notice of hearing of the original petition.

That Mr. Glaze was testifying only concerning the custom of the county clerk's office, and not from any

definite recollection of his own, is further shown by the cross-examination. [Tr. p. 745.] He again stated that he had no recollection as to the contents of the notice, and that he knew that he posted a notice on September 11 by the record on the back of the petition itself and the record in the register of actions, and the fact that he was the only one doing the posting at that time. [Tr. p. 745.] He stated, however, that another person filled in the date in the rubber stamp on the petition itself, that none of the handwriting of the witness was on any of the documents and that the register of actions was not posted by him. [Tr. pp. 745, 746.]

He also testified on cross-examination: *"So far as the filling in of the blanks is concerned, I could not state what was contained* in the notice. That was too far along." [Tr. p. 748.]

Mr. Glaze's evidence does not sustain the appellees' contention that this court must presume that proper notice was given, notwithstanding the failure both of the decree and the record to show such notice. His evidence is extremely uncertain as to the posting of any notice at all, and if any notice was posted the form produced by him [Tr. pp. 743, 744] did not comply with the requirements of section 1634 of the Code of Civil Procedure.

The notice of the hearing of the final account and petition for distribution is void: the purported "supplemental petition" for distribution did not contain a final account; neither the so-called "supplemental petition"

nor any other petition for final distribution could legally be filed until *after* the final account had been settled (C. C. P. 1665); a notice of the hearing of the "supplemental petition" was not given; even if such notice had been given, it would not confer jurisdiction upon the court to settle the final account, and therefore no jurisdiction would be acquired by the court to make an order for final distribution; the purported decree settling the final account and for distribution does not recite that due notice was given; the register of actions is not evidence of the doing of any act, and even if it were, it does not show that any notice was given or that an affidavit of posting was ever made or filed other than the affidavit of the posting of the void notice. Mr. Glaze's testimony only shows a custom of the county clerk's office, and he does not attempt to testify as to what actually was done beyond what appears upon the record; the court was without jurisdiction to settle the final account; and its purported order settling the same is void; the court had no power to order a distribution until the final account was settled, and the purported decree of distribution is therefore void.

The Jurisdiction of This Court Is Not Ousted Because the Proceedings in the Matter of the Probate of the Estate of Jeanette Fensky Are Still Pending.

The appellee, Merriam, administrator of the estate of Jeanette Fensky, denies the rights of the appellants in any property of the estate. He is proved to have

been guilty of concealing, of failing to collect and of failing to account for property and assets of the estate, and of aiding and abetting persons who are not heirs in acquiring and retaining property belonging to the estate.

In cases of this character there is no question but that federal courts of equity have jurisdiction over the parties and the subject matter in controversy, notwithstanding the pendency of the probate proceedings. A non-resident victim of fraud, deceit, or even of mistake, cannot be compelled to submit himself to the jurisdiction of the state courts of the state wherein the fraud or mistake occurred. It is not only the right of the federal court to exercise jurisdiction in such cases, but it is its duty so to do.

Green's Admrx. v. Creighton, 64 U. S. (23 How.) 90, 16 L. Ed. 419;

Waterman v. Canal Bank, 215 U. S. 33, L. Ed. 80;

McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762;

Snydam v. Broadnax, 39 U. S. (14 Pet.) 67, 10 L. Ed. 357;

Ingersoll v. Coram, 211 U. S. 335, 53 L. Ed. 208.

It appears to be the law settled by numerous decisions that Federal courts of equity have original jurisdiction over executors and administrators appointed by state probate courts, such executors and administrators being considered as trustees in favor of heirs, creditors, etc. of the estate.

The case of Green's administratrix v. Creighton, 23 Howard, 90, which was an action to establish a judgment against an administrator and the breach of his administrator's bond, and to seek discovery of the assets and an accounting, the court, in answer to the contention that the pendency of proceedings in the probate court might oust the jurisdiction of the Circuit Court of the United States, and referring to the case of Suydam v. Broadnax, 14 Pet. 67, said:

> "This court declared that the eleventh section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States. 'It was certainly intended,' say the court, 'to give to suitors having a right to sue in the Circuit Court remedies co-extensive with those rights. These remedies would not be so, if any proceedings under an act of a state legislature to which a plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court."

A leading case on this subject is that of Payne v. Hook, 7 Wallace 425. The facts in this case are not at all unlike the case at bar. In this case a citizen of Virginia filed a bill in equity in the United States courts of Missouri against the administrator and sureties on his bond to obtain for the complainant her distributive share in the estate of her brother. The plaintiff charged gross misconduct on the part of the administrator in making false statements, using money of the

estate for his private gain, and, that he "obtained through the use of false representations a receipt in full for her share of the estate, on the payment of a less sum than she was entitled to receive." The object of the bill was to obtain relief against these fraudulent proceedings, and to compel a true account of administration, "in order that the real condition of the estate can be ascertained, and the complainant receive what justly belongs to her."

On appeal from the decree dismissing the bill, the Supreme Court, in reversing the decree, said:

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states, cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the states, and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitations or restraint by state legislation, and is uniform throughout the different states of the union.
>
> "The Circuit Court of the United States for the District of Missouri, therefore, had jurisdiction to hear and determine this controversy, notwithstanding the peculiar structure of the Missouri probate system, and was bound to exercise it, if the bill, according to the received principles of equity, states a case for equitable relief. The absence of a com-

plete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings.

"'It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.'"

The opinion and decision in this case is frequently followed; notably in the case of Waterman v. Canal Bank, 215 U. S. 33, in which case, at pages 45-46 and 47, the court said:

"The complainant, a citizen of a different state, brings her bill against the executor and certain legatees named, who are likewise citizens of another state, and are all citizens of Louisiana, where the bill was filed, except one, who was beyond the jurisdiction of the court, and for the reasons stated in her bill she asks to have her interest in the legacy alleged to be lapsed and the residuary portion of the estate established.

"This controversy is within the equity jurisdiction of the courts of the United States as heretofore recognized in this court, and such jurisdiction cannot be limited, or in any wise curtailed by state legislation as to its own courts. The complainant, it is to be noted, does not seek to set aside the probate of the will which the bill alleges was duly established and admitted to probate in the proper court of the state.

"The United States Circuit Court, by granting this relief, need not interfere with the ordinary settlement of the estate, the payment of the debts

and special legacies, and the determination of the accounts of funds in the hands of the executor, but it may, and we think has the right to determine as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate, because of the facts presented in the bill. The decree to be granted cannot interfere with the possession of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor, and may be enforced against it personally. If the Federal Court finds that the complainant is entitled to the alleged lapsed legacy and the residue of the estate, while it cannot interfere with the Probate Court in determining the amount of the residue arising from the settlement of the estate in the court of probate, the decree can find the amount of the residue, as determined by the administration in the Probate Court in the hands of the executor, to belong to the complainant, and to be held in trust for her, thus binding the executor personally, as was the case in Payne v. Hook, 7 Wall, 425, *supra,* and Ingersoll v. Coram, 211 U. S. 335, *supra.*

"It is to be presumed that the Probate Court will respect any adjudication which might be made in settling the rights of parties in this suit in the Federal Court. It has been frequently held in this court that a judgment of a Federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of Federal right which may be protected in this court."

This case has been followed by the United States Supreme Court in the case of McClellan v. Carland, 217

U. S. 268. In fact, we think that it has been so definitely decided by numerous decisions that the Federal courts have jurisdiction over the parties, subject matter and the question in controversy in cases of the character of the one at bar, that the right of the court to exercise such jurisdiction and in fact that it is its duty to do so, can no longer be questioned.

We have previously herein discussed the invalidity of the pretended decree of distribution in the estate of Jeanette Fensky, invalid by reason of the fraud and the void notice of hearing of the final account and petition for distribution. Even though, for this reason, the proceedings for the probate of the estate of Jeanette Fensky, in California, are still pending, the appellants, being non-residents of the said state, cannot be forced to submit their controversy to the state courts; and because of the nature of the case the Federal court has jurisdiction to determine the interests in the estate to which the appellants are entitled and any decree of this court will be respected by the state court.

J. H. Merriam, Administrator of the Jeanette Fensky Estate, Should Be Held to Account to These Appellants for All the Property of That Estate, Which Includes the Land Described in the Void Deeds, Certain Promissory Notes and Property Which Was Concealed and Have Never Been Accounted for by Him.

His accountability sought by the complainants and proven by this record is based upon his mal-administra-

tion, his concealment of the property, his intentional diversion of it from the assets of the estate, the suppression of knowledge of those assets from the court and from these complainants and intervenor who had no knowledge of their existence or as belonging to the estate until 1912, long after administration. His omission to inventory the property renders it imperative that he make this accounting, the record shows that those omissions were purposely done and that he fraudulently concealed the property and diverted it to the great detriment and loss of these complainants and intervenor. This accounting should charge him with the full value of all this property thus sequestered by such violation of his duty.

A few days after the death of Jeanette Fensky, he was, at the instance of several of the defendants, appointed administrator of her estate, and thereupon contemporaneously was employed by the defendants to act as their individual attorney in reference to their pretended interest claimed in the estate and was paid by them retainers at that time to act in that capacity as attorney. This placed him in an attitude where his duties to those who retained him were to advance their pretended interests in the estate preferentially to any other claimants and prevented him from acting in a disinterested manner in the administration on behalf of all the heirs, the true heirs and beneficiaries, whether to him known or unknown, and thus having caused the opportunity to do wrong he grasped it and perpetrated the wrong and become subservient to

and acted solely according to the desires and interests of his clients and in doing so sacrificed the rights of these appellants and their co-heirs. By becoming such attorney he did a wrong act and placed himself in an attitude gravely suspicious where the interests of his clients were in conflict with his duty to other persons, who were these appellants and their co-heirs, and for whom as administrator he was trustee. He thus created that unlawful opportunity to do wrong and thereupon took advantage of it and perpetrated the wrong to solely benefit his clients and he colluded and conspired with the other defendants to defraud these appellants and their co-heirs mentioned, of both estates, of their rights and interests all merged in the property of the estate of Jeanette Fensky to which they were the heirs and owners by descent from her, and which were impressed with the trust heretofore shown in this brief.

Merriam and the other defendants all dreaded not only the possibility, but the certainty of a demand by these appellants and their said co-heirs for their said rights and interests in the event that he inventoried and thus divulged the existence of the property included in those void deeds as a part of the estate so that it would openly appear as forming a part of that estate, and therefore, collusively and under the advice of Merriam, that property was omitted and fraudulently excluded from the inventory and administration in order to dispose of it surreptiously through the medium of those worthless deeds, to the exclusive

benefit of the defendants. Accordingly those deeds were fraudulently and by legerdemain foisted into apparent validtiy by the post-mortem so called, delivery and *that too*, an impossible and an imaginary one, thereby to deceive and defraud, of course, the appellants of their rights in that property. This is the only reasonable deduction there can be no other. Of course it was not necessary for appellants to show this actual fraud and fraudulent intent, for it is undeniable, as a matter of law, that if the omission to include property in the estate was the result merely of mistake or accident or that it had been subsequently discovered property, nevertheless Merriam would be held liable in that case if he was inexcusably negligent in the exercise of his duty, and yet the fraud adds aggravation to his acts and omissions and, as almost always fraud works in secret ways its designs to accomplish, so did it work in this instance to the exclusion of these complainants forever from their property, had it not been discovered by them and had not immediate action been taken by them thereon in this suit.

That Merriam and the other defendants knew that this property was derived from the estate of Ferdinand Fensky and came to Jeanette Fensky from him and that they knew also of the trust impressed by reason of the fraudulent procurement of quitclaims by her from appellants, as to the property which came by descent from him to them, appears further from all of their conversations, acts and conferences with reference to her source of property as being through her

husband's estate, consisting partly of the *identical property* as to two parcels particularly, and the remainder of the avails of that property so derived by her from him, and that she had no other property acquired from any other source, and in this connection Merriam also knew and is conclusively chargeable with knowledge as a lawyer that the quitclaim deeds executed by the complainants of their interest in the estate of Ferdinand Fensky, even though they had not been fraudulently obtained by misrepresentation and concealment, as proven that they were so obtained, passed no interest of any kind that came by descent to them five years subsequently from the intestate Jeanette Fensky. [Tr. p. 610.] (McKenzie v. Budd, 125 Cal. 600.)

The letter of Merriam to Campbell [Tr. p. 610] shows conclusively that Merriam knew that Jeanette Fensky had not made any lawful disposition of her property, but that the deeds and papers were signed by her under the mistaken view that they would have the same effect as a will. He testified that he was employed by the relatives of Jeanette Fensky [Tr. p. 612] and that it had been arranged that he was to be administrator of her estate and that, "I think I advised them (the defendants) to carry out in good faith what the effort of Mrs. Fensky was to dispose of her property in the way that this was done." [Tr. p. 619.] Thus he was *substituting for the performance of his duty to the estate* of Jeanette Fensky, *his advice to these persons,* for whom he had accepted employ-

ment as attorney, to take this property under those worthless deeds and which they all knew were void, instead of accounting for the property and administering thereon.

Also [Tr. p. 460] see the diary of Campbell that he met Merriam and Thompson at the Hollenbeck and while they were together he told Thompson about the "Kansas Fensky heirs." The above facts in conjunction with the certainty and even the necessity of Merriam having to ascertain the source whence came the property of Jeanette Fensky which was by the decree of distribution of her husband's estate in Los Angeles county as her basic muniment of title.

Now we contend that these acts and omissions and concealments of Merriam positively show actual fraudulent motives in their doing and we therefore contend that even though had he not been chargeable with knowledge as to who were the true heirs and owners and had not specifically known by name who they were nor whom he was defrauding, yet he was defrauding those who were entitled to this property and that he knew he was defrauding them. We also contend that if he had not even intended so to defraud, yet his acts and omissions and concealments would have been constructive fraud and that in either case a court of equity would hold him to rigid account to those who had thus been deprived of their property by his acts. It is not necessary to cite any other authority to sustain our contention in these respects than the decision in this very case on appeal to the Circuit Court

of Appeals of Pickens v. Merriam, 242 Federal Reporter, 363 as that case substantiates every position here announced and cites ample authority to uphold it, and every averment in the bill of complaint in this case has been amply proven.

The defendants themselves, by their own testimony, have verified every act of concealment and fraud of which they are charged.

The Decree of a Probate Court Distributing an Estate and Settling the Account of the Administrator Is Not Conclusive, but, if Obtained by Means of Fraud or Mistake, a Court of Equity Will Grant Proper Relief Against the Same.

The honorable trial court held, as is shown by his opinion rendered herein [Tr. pp. 198, 199], that the decrees in the estates of Ferdinand Fensky and Jeanette Fensky were binding and conclusive upon the appellants. That would be true except for the existence of facts and circumstances warranting the interposition of a court of equity.

This court has said in the former appeal of this case, *Pickens v. Merriam,* 242 Fed. 363:

> *"that the settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account."*

We have shown by the evidence in this case that the decrees of distribution in the estates of both Ferdinand Fensky and Jeanette Fensky were obtained

through fraud, misrepresentation and concealment, deliberately planned and carefully executed, by means of which the appellants and others have been deprived of a large amount of money and property.

We think the case of *Pickens v. Merriam, supra,* and the case of *Griffith v. Godey,* 113 U. S. 89, cited by this court in that case, is conclusive upon the question.

In the case of *Pickens v. Merriam, supra,* this court, quoting from the case of *Griffith v. Godey,* 113 U. S. 89, 28 L. Ed. 934, said:

> "It is well established that a settlement of an administrator's account, by the decree of a probate court, does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity."

It will be noted that the complainants in the action at bar do not ask that any decree of court be vacated. They simply ask that the property belonging to the estate of Ferdinand Fensky and Jeanette Fensky that was never inventoried or accounted for, be now ac-

counted for by the holders thereof. The trial court did not pass upon the question as to whether or not the property that belonged to the estate of Ferdinand Fensky but converted by Jeanette Fensky to her own use and benefit, actually belonged to the estate of Jeanette Fensky or not; nor whether the property attempted to be conveyed in the deeds executed by Jeanette Fensky to the defendants but not attempted to be delivered until after her death, really belonged to the estate of Jeanette Fensky, or whether or not the grantees under such deeds were accountable to the estate of Jeanette Fensky for the same.

Even though it be conceded for the sake of the argument that no fraud had been perpetrated upon these complainants by Jeanette Fensky in obtaining the releases of the interests of complainants in the estate of Ferdinand Fensky, yet complainants would not be barred from the relief asked for in this action, for these releases could only bind complainants as to the property actually inventoried and distributed in the estate of Ferdinand Fensky, and could not in any way affect their rights in the property belonging to the estate of Jeanette Fensky and which was never distributed through the estate and which was fraudulently converted by the said J. H. Merriam, and to the use and benefit of the other defendants.

It appears to us that this case falls clearly within the rules laid down in the cases of

Wingerten v. Wingerten, 71 Cal. 105;

Lataillade v. Orena, *supra*; 91 Cal. 565.

Certis v. Shell, 129 Cal. 208;
Griffith v. Godey, 113 U. S. 89;
Wickersham v. Comerford, 96 Cal. 439;
Marshall v. Holmes, 141 U. S. 589.

In this latter case, at page 598, the court says:

"The rules laid down in Barrow v. Hunton were applied in Johnson v. Waters, 111 U. S. 640, 667, and Arrowsmith v. Gleason, 129 U. S. 86, 101. In Johnson v. Waters, this court upheld the jurisdiction of the Circuit Court of the United States, by a decree in an original suit, to deprive parties of the benefit of certain fraudulent sales made under the orders of a Probate Court of Louisiana, which court, by the law of that state, had exclusive jurisdiction of the subject matter of the proceedings out of which the sales arose. After observing that the Court of Chancery is always open to hear complaints against fraud, whether committed *in pais* or in or by means of judicial proceedings, the court said: 'In such cases, the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment, or decree, it will deprive them of the benefit of it.' In Arrowsmith v. Gleason, the grounds of the jurisdiction of the Circuit Court of the United States to entertain an original suit—the parties being citizens of different states—to set aside a sale of lands fraudulently made by the guardian of an infant, under authority derived from a Probate Court, are thus stated: 'These principles control the present case, which,

> although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As the case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.' "

It will be seen from the above that the Federal courts have adopted a liberal policy in relieving a party from the effects of a judgment or decree obtained by fraud.

In concluding this subject we again refer to the case of Pickens v. Merriam, in which this court specifically held that if by fraud, accident or mistake, the complainants had been deprived of property, that relief would be granted, and that the administrator of Jeanette Fensky's estate, the appellee Merriam, must be held to account for the property of that estate, for which he had not accounted.

In the case at bar the complainants only ask that the property belonging to the estate of Ferdinand Fensky that was never accounted for by the admini-

stratrix, Jeanette Fensky, and which has since come into the hands of these defendants, be now properly accounted for. This is relief of a character that has always been granted by courts of equity of California and by the Federal courts.

The principles laid down in the case of Lataillade v. Orena, *supra*, are peculiarly applicable to the case at bar. The facts of this case have already been stated. On the question of jurisdiction of the court of equity to compel the accounting, the court, at page 576, says:

> "The respondent contends that the Probate Court had exclusive jurisdiction to compel defendant to account as guardian, and that its decree, settling his accounts and discharging him from his trust, was final and conclusive; and in support of this position numerous authorities are cited. This is undoubtedly the general rule applicable to the settlement of the account of guardians, executors, and administrators, but we do not think it applicable to a case like this. Here, if the averments of the complaint are true,—and they must be assumed to be so for the purposes of this decision,—none of the matters now in controversy were passed upon in the settlement, for the reason that the guardian intentionally and fraudulently concealed from the court and his ward the fact that the latter had then or ever had any interest in the property in question. The cases cited state and apply the general rule, but, so far as we have discovered, no one of them goes to the extent of holding that such a settlement can shield a guardian from afterwards being called upon in a court

of equity to account for the property so concealed. (And see Estate of Hudson, 63 Cal. 454; Dean v. Superior Court, 63 Cal. 473; *In re* Cahalan, 70 Cal. 604; Tobleman v. Holdebrandt, 72 Cal. 316.)"

It appears to us that this case, and that of Griffith v. Godey, cited in the opinion of this court in the former appeal, are conclusive upon this question.

The appellants did not have any notice or knowledge of the truth respecting the amount, extent and value of the estate of Ferdinand Fensky, nor of the frauds committed upon them by Campbell, Jeanette Fensky and defendant Merriam, until July or August, 1912; and not until 1913 did they have any notice or knowledge that the deeds signed by Jeanette Fensky were not delivered during the lifetime of said Jeanette Fensky. [Tr. pp. 280, 281, 542, 543.] In 1912 one of the daughters of the appellant, Louisa Pickens, was visiting in Los Angeles and by chance came into the possession of the correspondence that passed between Campbell and Jeanette Fensky during the time the estate of Ferdinand Fensky was in probate, which disclosed a part of the fraud committed by Campbell and Jeanette Fensky. [Tr. pp. 280, 281, 283-289.] An investigation was thereupon begun which resulted in the commencement of this action.

We accordingly, in closing this brief, reiterate with all sincerity and earnestness that the history of this case, as here represented, presents a series of iniquitous acts of plunder to the detriment of appellants and the

co-heirs of Ferdinand Fensky which, for subtleness and dexterity and iniquity, would be difficult to parallel and that it is obvious that the appellants are entitled to their full distributive shares of their deceased brothers and to their distributive share of the estate of Jeanette Fensky, deceased, and to such other and further relief as to the court may seem equitable and just.

We most respectfully submit that the Honorable Trial Court erred in entering the decree in favor of the defendants, and in entering the final decree of dismissal [Tr. pp. 199, 200], and that the cause is sufficient in every respect to justify the interposition of a court of equity, and that the complainants are entitled to relief as prayed.

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